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INDIAN WATER AND RELATED LAND RESOURCES PROBLEMS  
IN THE  
YELLOWSTONE RIVER BASIN AND ADJACENT COAL AREAS  
OF  
MONTANA, WYOMING, NORTH DAKOTA AND SOUTH DAKOTA

Preliminary Draft

"A Staff Report on Problems, Issues and Needs"

July, 1975

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The following report was prepared by staff personnel of the Missouri River Basin Commission for the purpose of providing an overview, summary of the various Indian water and related land resources problems in the Yellowstone River Basin of the States of Montana, Wyoming, North Dakota and South Dakota. The results of this study will be used in formulation of a detailed Plan of Study for the Basin as the guide for preparation of a comprehensive plan for the management of the water and related land resources in the Basin. The report may also serve as background information for the development of special study/task assignments to be performed in the Level B Study program. The report does not represent official policy or program recommendations of the respective Indian Tribes, departments or agencies of federal, state or local governments or the Missouri River Basin Commission.



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Water Resource Inventories  
Water Needs and Requirements  
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## INTRODUCTION

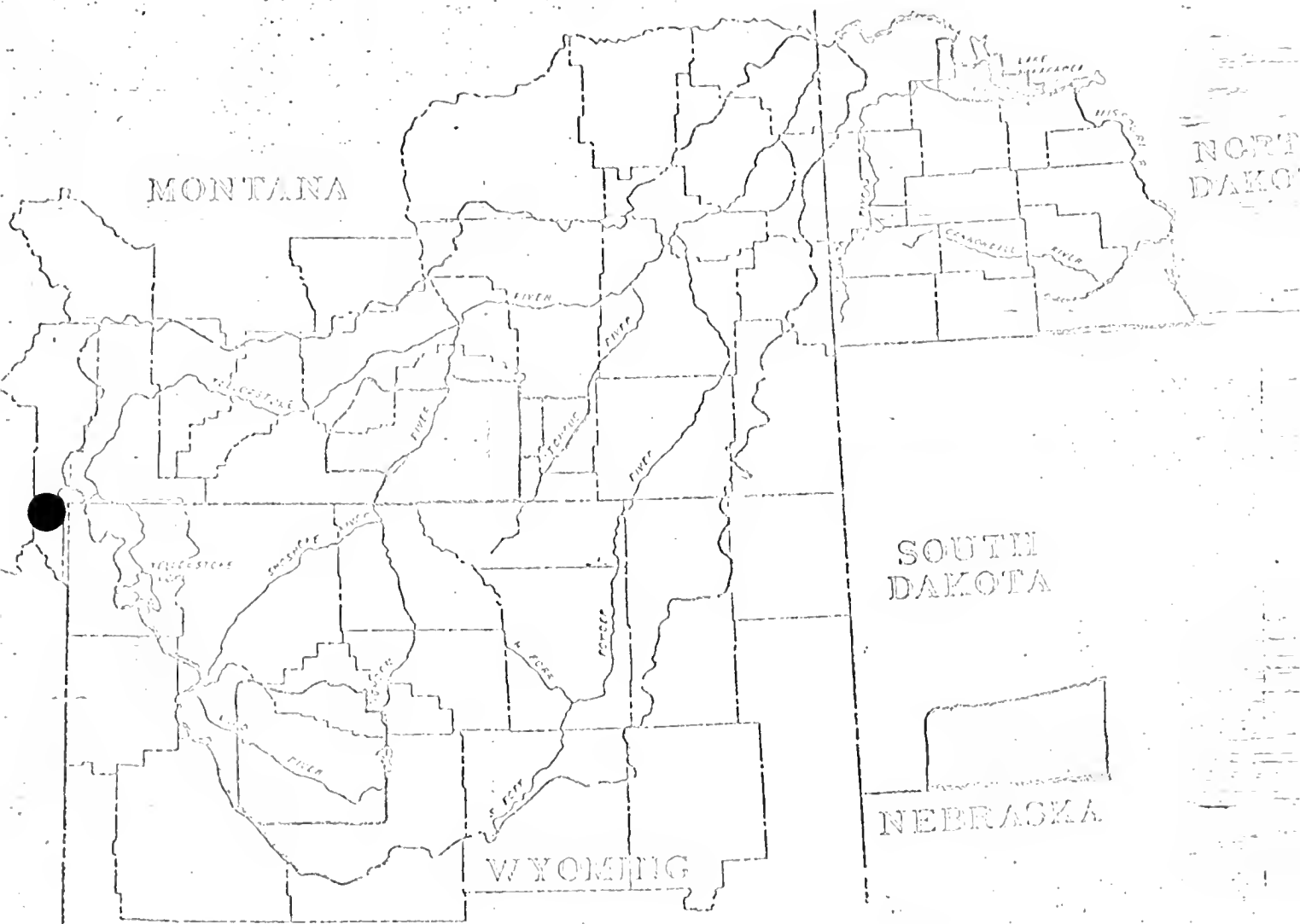
Study Scope, Objectives and Time Frame - The subject study, of which this report is a part, is a Level B study authorized under the provisions of the Water Resources Planning Act of 1965, as amended. The Level B study, under the sponsorship of the Missouri River Basin Commission, has the objective of formulating a multiobjective plan for water and related land use for the Yellowstone River Basin and adjacent coal areas in Montana, Wyoming and North Dakota. The plan will serve as the base for effective implementation policies, plans and programs. The plan is scheduled to be completed for submittal to the Commission in November 1976, with the study covering an 18 month period.

Area of Study - The study area covers the Yellowstone River Basin in the three states of Montana, Wyoming and North Dakota. This area encompasses over 70,000 square miles and covers 46 counties. There are numerous Indian Reservations in this area. The Reservations covered by this report are: Montana - Crow and Northern Cheyenne; Wyoming - Wind River; North Dakota - Fort Berthold and Stand Rock Sioux; and South Dakota - Pine Ridge. A map describing the study area and indicating the above listed Indian reservations follows.

Purpose of Report - The Commission study staff identified a number of major problem areas or topics of primary interest in the subject study program. This report, on Indian water resources problems, has been prepared to serve as a description of the many issues and factors involved. The context of the report is to: 1) give a brief historical description of the problem as it pertains to the study area, 2) indicate levels or ranges of potential demands of the resource, 3) review plans, programs, studies and activities of various agencies, tribes, etc. to resolve the problems, 4) assess, evaluate and discuss shortfalls and deficiencies in programs to resolve the problems, and 5) summarize and propose possible solutions to problem resolution.

Dependent upon the output of this report and the findings-conclusions thereof as resolved, the report will assist in development of specific details of the Plan of Study (POS) for the Level B Study Program and subsequent work program tasks and assignments.

Statement of the Problem - In the subject matter field, there exists such a diversity and multiplicity of facets and perspectives to the problem that a concise summary or statement of the problem defies specification. For purposes of this report a dual context will be used to frame the approach. From the broader perspective the problem can be viewed as constraints upon the development of effective water and related land resources policies, plans and programs. Nonresolution of the problem imposes constraints upon the formulation and effectuation of optimum decisions with respect to policy guidelines; constraints upon the development of alternative resource utilization and management plans that would serve to guide the future course of development and/or management of the resource base; and constraints upon the implementation of programs that would serve societies needs and objectives.



Within the specific context of this report the problem will be approached on an economic framework basis. While it is recognized that the problems and issues have a variety of social, environmental, institutional, etc. aspects it appears convenient for evaluative purposes to analyze the problem on a supply and demand basis. On the supply side, there are quantity issues; on the demand side there are resource use issues. In essence the supply of water is limited in terms of quantity and demands appear to be for a multitude of alternative uses. In summary the interaction of supply and demand as evidenced through existing and potential demands for increased use of a limited resource base forms the focus of the situation. The area of conflict, both presently and in the future, is in the area of Indian versus non-Indian control or management of the demand and supply factors of the Yellowstone River water resources.

The sections of the report that follow will develop, analyze and expand on the specifics of the approaches outlined above. Reference should be made to the section on Specifics of the Problem described in the Table of Contents of this report.

## SPECIFICS OF THE PROBLEM

Background - The purpose of this section (of the report) is to set forth and examine the "basics" or underlying facets of the basis for the problem. Typically reports dealing with Indian water resources are devoted almost entirely to matters of water rights and the legal considerations involved. As the body of federal reserved rights, Indian water rights, state water rights, and Federal-state relations is extensive and complex, it is not presented herein. Reference to these accounts can be found in the reference section of this report. It is intended in this report to present an abstracted and summary version of the core materials sufficient to gain an understanding of the problem.

Historical Setting - The historical consequences of whether water rights inure to an Indian tribe and to what extent, has been largely a matter of judicial interpretation, and has been, in effect related to the development of the Western United States. The development of the West was followed by the adoption by the States of the prior appropriation system of water rights for surface waters and general repudiation of the common law doctrine of riparian rights. Founded upon earlier Spanish precedent and coupled with practical physical resource considerations in the West, this legal system developed separately from the Federal reservation system or doctrine. The genesis of the body of the Western law of Indian water rights developed in part from this reservation doctrine. In its simplest form the reservation doctrine is: "if the United States, by treaty, act of Congress or executive order reserves a portion of the public domain for a federal purpose which will ultimately require water, and if at the same time the government intends to reserve unappropriated water for that purpose, then sufficient water to fulfill that purpose is reserved from appropriation by private users." The effect of the doctrine is twofold: (1) when the water is eventually put to use, the right of the United States will be superior to private rights in the source of water acquired after the date of the reservation, hence such private rights may be impaired or destroyed without compensation by the exercise of the reserved right, and (2) the federal use is not subject to state laws regulating the appropriation and use of water. The origin of the doctrine was set forth by the U.S. Supreme Court in the case of United States v. Rio Grande Dam and Irrigation Company, 174 U.S. 680 (1899). Redefinition and restatement of the doctrine has taken place over the years and is now firmly accepted case law.

With respect to Indian water rights, a variant form of the reservation doctrine is operable. The concept of tribal water rights had its real beginning in 1908 in the case of Winters v. United States, 207 U.S. 564 (1903), which held that the setting aside of an Indian reservation necessarily reserved the water without which the lands would be valueless. This decision has become known as the Winters Doctrine and has served as the keystone upon which virtually all Indian water rights cases have been based. Salient aspects of this doctrine and subsequent case law interpretations are set forth in subsequent sections of this report.

During the period of settlement and development of the West, the non-Indian and Indian sectors alike experienced marked differences in economic growth. Development and growth in the valleys of Montana, Wyoming and North Dakota were founded upon an agricultural economic base, dependent

upon the availability of water at a cost and quality commensurate with a profitable operation. The subsequent growth of this type of economy relied upon development of a firm supply of water. This development by and large was essentially a non-Indian undertaking. The Indian sector on the other hand, handicapped by the modification of their cultural economic basis during the late 1800's, were not able to develop a diversified economy at the same pace as the non-Indian sector. The Reservations' limited agricultural base was only marginally used; consequently the demand for water was minimal, increasing at a slow pace up to the present time. The imminence of potential expanded use of water for energy development purposes and other Indian uses has caused awakened interest in resolution of the problem of use/non-use by Indians of their water resource base.

Analysis of the Issues - Within the context of the economic framework discussed in the foregoing section the problem can be broken down into major issues or factors. For ease of analysis a series of charts follow (Figures 1, 2, and 3) which outlines these issues. Figure 1- SUPPLY, considers the quantity aspects of the problem. Figure 2- DEMAND addresses the major use issues of the problem. Figure 3- THE PROBLEM portrays the interaction in real world terms of the water resource base and the factors of supply and demand constraints. Each of the issues is discussed in detail below.

### SUPPLY

The major overriding issue is that of the physical quantity of water that may be allocatable/adjudged as "Indian water." Given that the supply of the resource is limited, then the quantity available must be assigned on an Indian and non-Indian basis.

### Issues

#### Quantification

Under this issue there are three factors to consider:

- 1) Amount - what is the physical amount or entitlement of water that may be "Indian water?" If one considers the dictum of the Winters Doctrine in its broadest aspect, it would appear that the quantity assignable as Indian is unlimited or limitless, subject to certain qualifications. Most of the case law has established that the quantity of the right is to be measured by the amount required for irrigation of all lands within the reservation susceptible (practicable) of irrigation. In Arizona v. California, 373 U.S. 546 (1963), the measure established (ie. of the quantity) was to determine Indian water requirements based on using Bureau of Reclamation standards for measurement of water requirements for lands that are of a practicable irrigable nature. While this ruling appears to fix irrigation potential as the measure of all Indian rights, there is no definitive holding to that effect. Also it cannot be stated with precision whether uses for recreation, industry, or energy-mineral development will be considered as a portion of the irrigation water allotment, as simply changes of use from the original purpose, or whether they entitle the Indians to additional quantities over and above that needed for irrigation purposes.

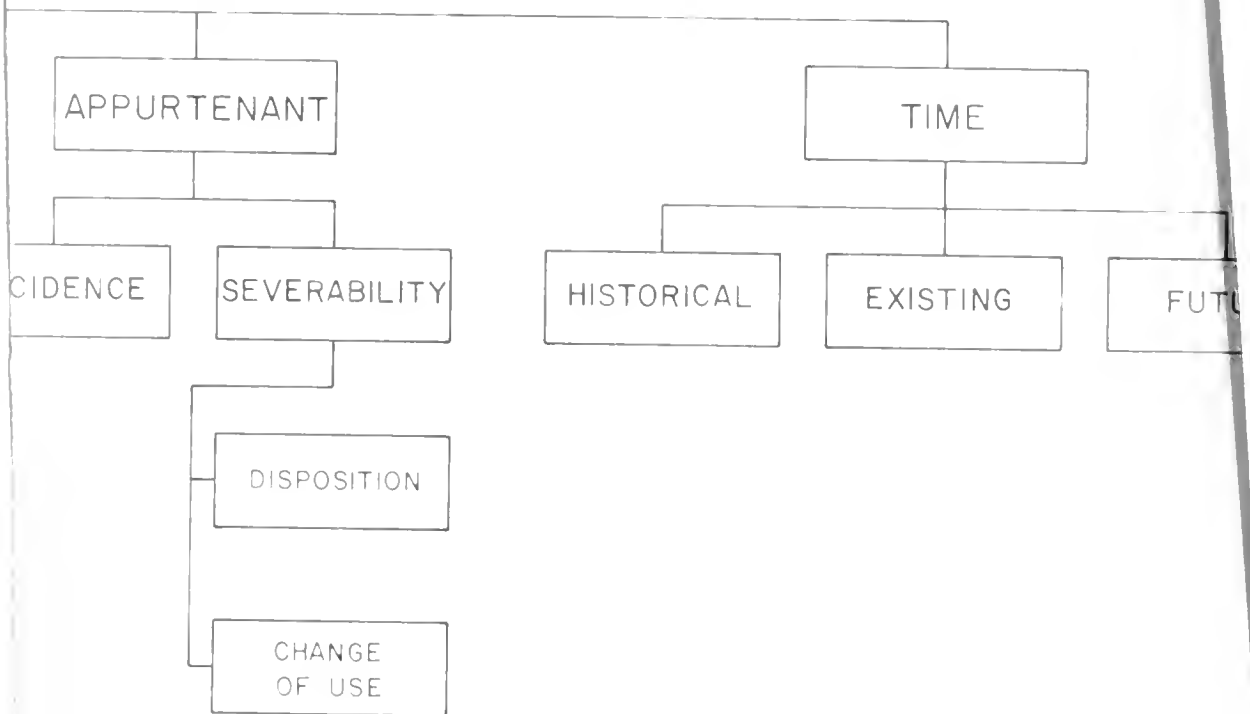


Figure 1 SUPPLY ASPECTS OF INDIAN WATER RESOURCES PROBLEMS

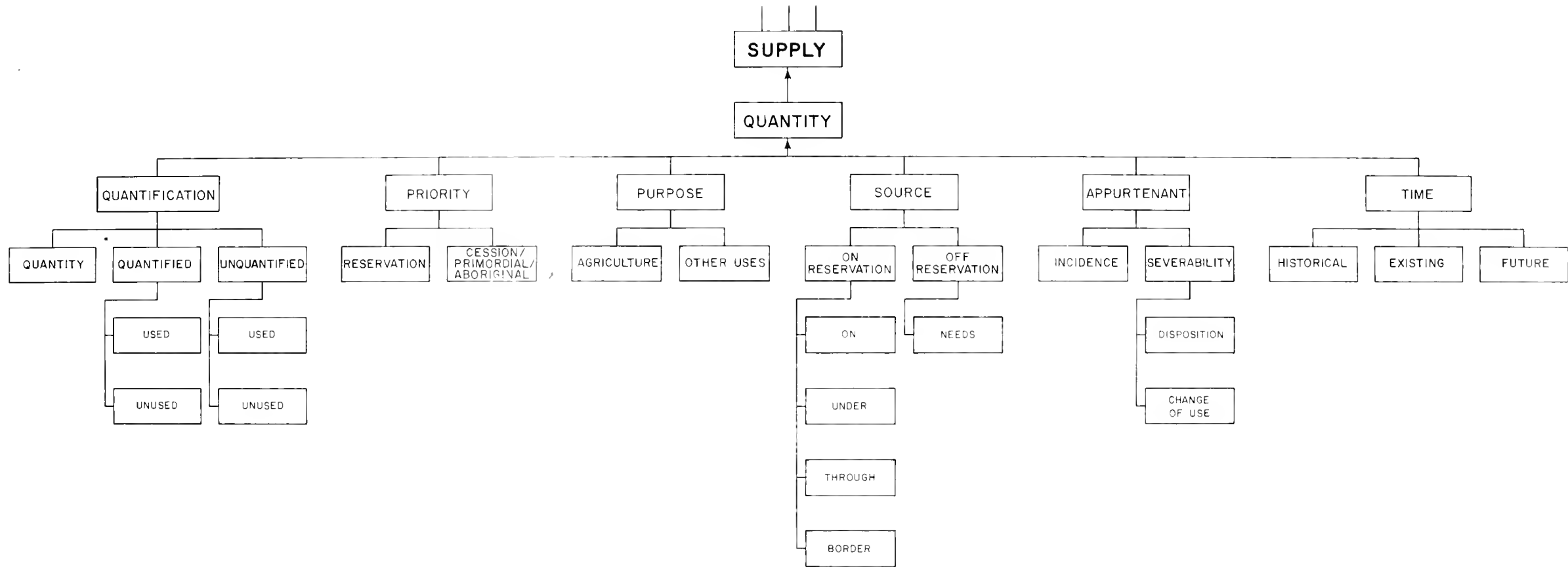


Figure 1 SUPPLY ASPECTS OF INDIAN WATER RESOURCES PROBLEMS



- 2) Quantified, used - in those cases where the extent of the right has been judicially adjudicated the issues typically have centered on determining the extent of the quantity right of non-Indian use versus Indian use. The broader issue of total potential Indian entitlement has normally not been addressed and the adjudication has been conducted on the issues at hand, typically priority of appropriation, amount based on use, etc. The exception to this was the adjudication contained in Arizona v. California discussed above. Where a judicial quantification exists as to rights based on use, it would appear that the Indian rights determined are binding on the Tribe as to quantity. On the Reservations included in this report there are only minor adjudications, with quantification based on use, and the amounts involved are not significant in terms of the larger overall problem of quantification.
- 3) Unquantified, unused - most Indian water rights have not yet been adjudicated, particularly for the Reservations included in this report, and thus the rights and their quantities have not been fixed by judicial decrees. In this situation the conflict is most evident between existing non-Indian uses (and proposed increases-additional uses) and newly initiated or potentially initiabile Indian uses. For the Reservations in this report, it appears that the major problem centers on these unexercised rights to future uses, which in the absence of adjudication, pose uncertainties as to future (even current uses in some situations) use and development of the water resource base. As time evolves, it is apparent that the Indians will increase their utilization of water and for a variety of uses, thus offering the potential for direct conflict with non-Indian development.

A subvariation of issue "2) quantified, used" would be cases where quantification has been adjudicated but the future use will not take place for many years and thus the final use quantities are not currently known. This was the case in Arizona v. California. As the ultimate issues remain as to allowable future use, this situation (for purposes of this report) is considered the same as issue 3) above but directed at only the use aspect.

### Priority

Under this issue there are two major factors to consider:

- 1) Date - at what date does the Indian right attach? As the appropriative right doctrine (ie. first in time is first in right) does not apply to Indian rights (ie. they are created outside of State law systems) the case law has developed to establish that an Indian water right arises under Federal law and comes into being when a Reservation is created, whether the act of creation is a treaty, act of Congress or an executive order. As diversion and application to beneficial use is not necessary for the creation of an Indian water right, it follows that the actual right arises no later than the date the Reservation is established even though the first use of the water is much later in time. For the Reservations included in this report, the dates of establishment



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are in the 1860's and 1880's, thus predating non-Indian development and appropriations by many years in the majority of cases. Thus the Indian rights are senior to all others, except those few that may have been acquired before the Reservations were established.

- 2) Type - another aspect related to priority issues is that of the type of right. Most Indian reservations were established by treaty (prior to 1871) and since then by executive order. In most of the litigation the date of the reservation or treaty has implicitly or explicitly been regarded as the priority date of the Indian water rights. In certain matters another issue has been raised, namely that of cession, primordial title, and aboriginal rights. These arguments allude to the Indian cessions to the United States of Indian titles to other lands. The priority of the water rights the Indians reserved to themselves would stem back to antiquity and have existed from time immemorial. This issue of an ancient priority has not yet been litigated. For purposes of this report it is not a significant deficiency as most of the Indian reservations were established prior to any extensive non-Indian water development or settlement.

#### Purpose

There are two major factors:

- 1) Agriculture - most of the case law on this factor has been related to the purpose for which Reservations were established, namely to "civilize the Indians, provide irrigation so that the Indians would give up their nomadic life and settle in civilized agricultural communities." Accordingly the cases have related to determining the use of waters as required to undertake irrigated agriculture. Quantification, where accomplished, has related quantity to need based on irrigation requirements. The criterion of measure, as established in Arizona v. California, of practicable irrigable is felt by most to be the established policy. Whether the quantum determined by this measure is the total for all uses, present and/or future, remains indeterminate pending judicial determination. It is obvious to all that in the late 1800's, when the majority of the reservations were established, the primary purpose of the reservations was for agricultural purposes. It was not envisioned that reservations could be the future siting for industrial development (e.g. gasification, liquefaction, thermal power plants, etc.) If the current uses were only agricultural, the issue would be clearer; however, none of the existing non-agricultural uses (with minor exceptions as for fishing, limited mining, etc.) and potential infinite number of putative uses, has been judicially decreed: thus there is neither judicial approval or disapproval but rather merely non-approval.

- 2) Other uses - this issue in its simplest form is whether Indian water (quantified or non-quantified) can be used now and in the infinite future for non-agricultural uses? There appears no strong argument against uses for irrigated agriculture, domestic and municipal purposes, livestock production, etc. that are related to an essentially agrarian life style and economy. When uses beyond those atypical agricultural uses are proposed, the issue is indeterminate. In most instances the reservation purpose was obviously agricultural and did not contemplate historical developments such as manufacturing, industry, energy, etc. that are actual or imminent in 1975 and any supplemental developments that technology evolves in the future. The only clear answer available to resolve the issue of non-agricultural uses is a judicial decree that would establish precedence as to allowable or non-allowable uses of Indian water. In the absence of such decree, it appears that the Indians will continue to utilize the water for non-agricultural uses now and in the future. It should also be kept in mind that State law criteria as to application of water for beneficial uses does not apply to Indian water. Also, if the argument holds for paramount immemorial rights, then any use can be made of the water under Indian ownership.

#### Source

The major considerations are:

- 1) Reservation - the source of the water supply has received considerable debate over the issue of the location of the supply source. The generalized finding is that the Indian right entitlement extends to "all sources--streams, lakes and springs which arise on, border, traverse or underly the lands of the reservation."

There does not appear to be doubt as to those waters arising in their entirety on the reservation. Bordering and traversing cases raise the issue of the Indian's pro-rata share of the given flow and the priority question. Entitlement to groundwater (ie. underly) is less clear, although it is apparent that most courts would probably rule in favor of underlying groundwater being vested with the surface owner. As to the bordering and traversing issue, it can be probably presumed that a court would find in favor of a Tribe if all or a portion of the flow is "necessary to the reservation." This would probably also hold true even if other Reservation water were available in certain amounts and would most probably hold in the case where these bordering and traversing flows were the only or major source of water supply to the Reservation.

- 2) Off-reservation - in this case where the source of supply is off the reservation (apparently regardless of distance) the criteria would be that a Tribe is entitled to a supply of water from off-reservation sources in sufficient quantities (and quality) as is required for their "needs" or that is "necessary to the reservation." This principle emanated in part from the "federal reservation doctrine" which assures water to Indian reservations based on the reserving

of water for the purpose for which the land was originally withdrawn from the public domain, namely for establishment of an Indian reservation. With an unclear issue of this type, it is apparent that any litigation would have to deal with interpretations of needs (ie. use - agriculture vs. other) and the definition of necessary (ie. for subsistence, for current needs by type of use, for future demands by amount type of use, etc.)

There is also the matter involving off-reservation sources in an interstate situation. Sub-sets of this case can also involve competition for the water supply between separate Indian reservations in separate states, competition for water by non-Indian users in one state with the source of supply being located on an Indian reservation in a different state, and various combinations or alternative arrangements. In all of these situations the case law is virtually silent except in the Arizona v. California decree. It would appear that if litigation ensued, the courts would in all likelihood attempt to strike for an equitable apportionment among all users, both Indian and non-Indian.

### Appurtenant

The major considerations are:

- 1) Incidence - this issue centers on: to what lands the Indian water rights are appurtenant. Typically, when one is discussing Indian water the inference is that it pertains to lands held in trust status for and on behalf of the collective tribal members. However, in addition to purely tribal trust lands there are also a wide variety of estate situations where non-trust lands are involved. Among these are: lands allotted to individual tribal members, land allotted to tribal members who have sold the lands (both surface and subsurface estate or portions thereof) to non-Indians, lands wherein the surface rights estate is held in non-Indian ownership and the subsurface estate remains as tribal trust property, allotted lands still in a trust situation, fee simple (surface and subsurface estate) lands in non-Indian ownership within the exterior boundaries of an Indian reservation, etc. plus numerous other combinations. In all of the various possible combinations described above the specific answers are unclear. It would appear that the Indian water right quantum applies to the largest amount, namely that amount that would be reserved to the Tribe as a body. An allottee of tribal lands also obtains the rights to use "some portion of tribal waters essential for cultivation. (U.S. v Powers, 305 U.S. 527) If the lands remain allotted in a trust status then the allottee can use so much of the reservation waters as "is reasonably required for use on the allotment." The effect of Powers is to make a pro-rata share of the tribal reserved rights appurtenant to the allotment. This same criterion applies when the lands go into fee ownership (Indian or non-Indian) in that the share of the reserved right goes to the transferee.

## Time

The issues are:

- 1) Historical - the reserved right, unlike an appropriation right under state law, is not dependent upon and is not measured by present or historical needs. In effect the Indians' needs at the time of creation of the reservation (either actual in use or needed) cannot be used to measure the reserved right.
- 2) Existing - similarly, the present needs of the Indians (ie. 1975) cannot be used to measure the reserved right, since the reservation was not merely for present but for future use.
- 3) Future - the same criteria as above also applies as to quantity for future needs and uses. As the reservation was for future use, it follows that the amount of the reserved right is in sufficient quantity (and quality) to satisfy future needs and requirements. Aspects of relating future quantities needed without present quantification is covered above under the Purpose issue (ie. other uses) and in the Demand section under Measures of the right.

## DEMAND

From the demand standpoint the majority of the issues fall into two major categories. The first relates to the use and/or non use of the water resource supply. Most of these center on the types of uses operative or contemplated by the Indians correlated with determined Indian requirements. The second relates to the extent, in quantitative terms, of the Indian water rights. It is virtually impossible to project with any degree of precision the possible future uses to which the water resource could be committed and thus no firm estimates of future Indian water requirements can be definitively formulated. Concomitantly, a similar problem exists in attempting to quantify the extent of the right based on forecasts of future needs and quantities. To coalesce the issues, it appears reasonable to assume that demands, whether for present or future uses and requirements versus desires, will always be in excess of quantities or supplies. Given this probable irresolvable situation, it appears that the demand issue resolves to allocation or apportionment of the scarce or limited water resource among alternative competitive uses, both in the present and future.

## Issues

### Measures

The issues related to the measure of the rights are:

- 1) Criteria - at the present time certain Tribes often claim a reserved right to all waters of the reservation, without regard to any quantification standard. Case law findings indicate as to Indian reservations that the reserved right is for sufficient water to satisfy the purposes for which the land (the Indian reservation) was reserved or was withdrawn from the public domain. This purpose





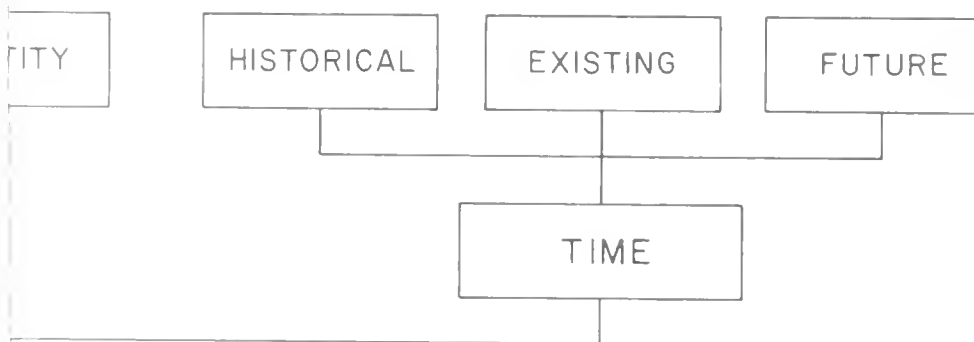


Figure 2 DEMAND ASPECTS OF A  
WATER RESOURCES PROBLEM

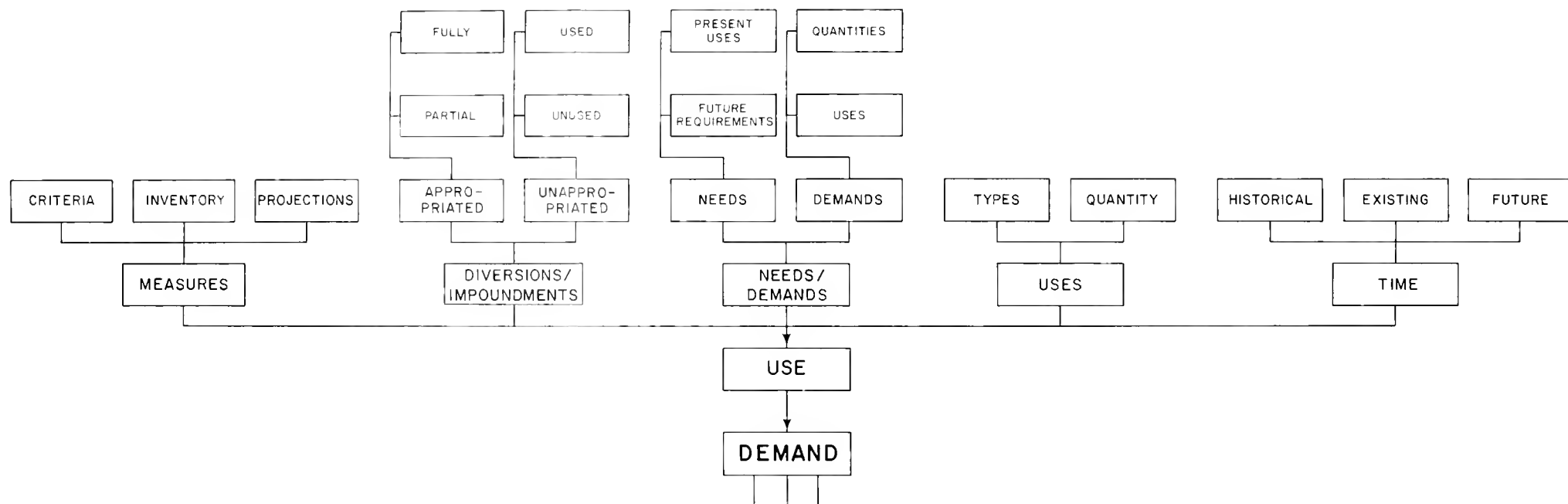


Figure 2 DEMAND ASPECTS OF INDIAN WATER RESOURCES PROBLEMS

DUMMY SHEET

Figure 2 DEMAND ASPECTS OF INDIAN  
WATER RESOURCES PROBLEMS



DUMMY SHEET

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WATER RESOURCES PROBLEMS

has often been interpreted as merely irrigation, so that the measure criterion is the water required to irrigate the reservations irrigable acreage. Even the Winters Doctrine spoke not only of irrigation, but also of the establishment of "civilized communities" and of "agriculture" and "the arts of civilization". Since the Winters right is reserved for present and future uses, there are undoubtedly future needs (agriculture and other) which were unforeseeable then (ie. when the reservation was created) and needs now and in the future which are unforeseeable. Even given the measure criterion it remains unclear as to whether that amount of water could be used for purposes other than agriculture. As it currently stands the accepted measure is that advanced in the case of Arizona v. California as to utilization of the practicable irrigable test. It also is true that the potential to use for future use (at least agriculture and probably other types of uses) are not in danger of being lost or abandoned through non-use, as the right runs in perpetuity.

- 2) Projections - in this issue the point raised is that of attempting to measure current uses (type and quantity) and then projecting certain measures of use into the future to establish the future measure of the right so as to enable quantification today. This aspect does not hold up for the reasons described above under criteria. Just as one cannot project future quantities, one cannot project future uses or needs. The right reserved is always large enough to satisfy future needs regardless of projections made currently. The projections at best could only serve as guidelines or possible levels of use but would not have the force of quantification. The projections could serve as planning data for the Indians for their use in formulation and implementation of future development programs for the water resource, but would still not be binding as to current or even future attempts at non-litigative quantification (ex. reservations or allocations to the Indians currently for future use).
- 3) Inventory - in attempt to fix the measure of the Indian right, it is frequently advocated that by conducting an inventory of current uses and by default the quantity of the uses, this would enable quantification to be effected. In actuality the inventorying of Indian water uses has no bearing on establishment of the measure of the rights. In essence, all it would provide would be data and information from which to base future development programs for utilization of Indian water. The inventory data is frequently of more use to non-Indian use advocates as criteria to include in litigation to adjudicate appropriations by non-Indian users versus Indian users. The quest for inventory stems in part from the form of quantification effected in the Arizona v. California case where there was an inventory and a fixing of every possible use. In these kinds of adjudications, there are numerous disadvantages. Most adjudications of water rights are based on facts and evidence of past events, but quantifying Indian rights will involve what may be only guesses as to feasibility of some future uses. Also inventories have been used as the basis in some cases to effect quantification by non-judicial means (e.g. agreements, compromise, settlements, etc.) which does not resolve the issue but may solve a conflict between Indian and non-Indian users. At best the inventory provides needed information for planning purposes but cannot be considered conclusive as to adjudication or measure of the extent of the rights.

## Diversions/Impoundments

The issues are:

- 1) Appropriated - appropriation is essentially a matter of state law (ie. diversion and application to beneficial use under state law) and thus has limited applicability with reference to Indian water rights and is not recognized by the courts. (Refer to Appendix for legal citations). The exclusion of state jurisdiction applies not only to reserved water rights exercised as to tribal lands but also as to reserved rights exercised on allotted lands. As to allotted lands which are no longer under Federal trust (Indian or non-Indian ownership) the issue is not clear because of the pro-rata share problem and the terms of the lifting of the trust status. From the case law it is clear that all waters which arise on, underlie, flow through or border a reservation may be tapped to satisfy the Indians' reserved water right. However, the courts have also considered the Indians' reserved right subject to quantification and that any excess water is available for non-Indian use pursuant to state law. (Refer to Appendix for legal citations). Accordingly it appears that: any surplus water over the Indians' reserved right, if that total right is quantified, is subject to appropriation under state law. Even though the surplus may be appropriated under state law, it is subject to the possible expansion of the Indians' use of their reserved rights as their needs increase in the future. In the Indian reservations covered by this report there are very few judicial quantifications as to appropriations, either fully appropriated or partial appropriations. In the various states, there are records of appropriations (ie. notices, filings, etc.) from streams within and without (ie. border, traverse, etc.) the Reservations, however in the most part these have not been adjudicated and thus it is virtually impossible to state that any given stream is quantified or that it is either fully or partially appropriated.
- 2) Unappropriated - as the majority of the water rights in/to/ streams in the Indian Reservations covered by this report have not been quantified as to appropriated or not, it leaves the status of the streams in doubt. With reference to Indian water rights, the various tribes consider the streams to be unappropriated and thus their entitlement to be unlimited. In the absence of an adjudication, all rights (Indian and non-Indian) are considered unquantified. Thus the tribes are free to develop the water resource base to their fullest extent and use without regard to any non-Indian use, either existing or potential future. As the extent of the Winters Doctrine provides for unlimited future use of the rights, even though presently unused, the Indian development programs are free to expand up to the full extent of the Indian reserved right. In certain instances the ultimate use of the reserved right could jeopardize, if not preclude, any downstream non-Indian development. The greatest threat (real or potential) to the total water resource development programs is the uncertainties surrounding the amount, extent, and infinite etc. nature of the reserved right to the future use of the unappropriated, unquantified, unused waters subject to the Indian rights.

## Needs/Demands

The issues are:

- 1) Needs - unlike an appropriation under state law, the measure of the Indian reserved right is not dependent upon and is not measured by present needs. This is true at the time of creation of the reservation (ie. cannot use historical use), is true for current 1975 needs/uses and is true for future needs/uses (since the reservation was not merely for present but for future use). (Refer to Appendix for legal citations). Also, since the reserved right is large enough to satisfy future needs, it per se is not lost or abandoned through non-use. The Winters Doctrine in effect, and as extended by Arizona v. California, reserves for/into the future whatever quantum of water may be required to meet the needs of the Indians. Whatever these future requirements may be, both as to quantity required and even types of uses to be made of the rights reserved, appear to be fully provided for. The major unresolved issue may be the future conversion of uses to be made of the water (ex. coal gasification use vs. irrigated agriculture). If these future uses appear to be necessary for the "sustenance and livelihood" of the Tribes it is likely that the courts would look with approval on favorable concurrence as to these expanded uses. The "future requirements" as to uses appears to be as open-ended as the extent of the quantity of the Indian reserved right. An apparent issue may ensue wherein the attempt would be made to relate the measure amount available (ie. factor times practicable irrigable) to future requirements by a system of prioritization or allocation of the amount to the determined requirements.
- 2) Demands - the issue here is in assessing or evaluating needs versus demands. Obviously in the future the potential demands can be unlimited both for quantities and uses. Further, demands are not the same as needs or requirements. Demands place the resource allocation problem within the context of a price or market mechanism for the allocation process. Needs may or may not be equatable in a market allocation or pricing context. Due to the nature of the Indian right under the Winters Doctrine, it appears that if the Tribes exercise their rights to the maximum extent of the right that a large number of the potential demands (e.g. energy conversion, industry, etc) could be accommodated if the Tribes so chose. In essence the quantities are probably available to meet a vast number of the demands, assuming of course an absolute or finite limit at some point. The real crux of the demands issue is more related to the types of uses represented by the demands. By and large these uses are for the non-traditional uses and are geared towards other uses not envisioned by the Winters Doctrine and subsequent case law on the matter of uses. State law interpretation as to what constitutes legal beneficial uses does not apply to the Indian reserved rights. Only the possible problem with respect to ultimate conversion of all or part of the Indian reserved right to uses other than those of an agricultural, pastoral or subsistence type of economy clouds the future with respect to accommodating demands for uses of those types typically associated with Indian water resources development.



## Use

The issues are:

- 1) Types - the Winters Doctrine, and other case law, have related primarily to irrigation. However, at the present time most Indian reservations are using waters for a wide variety of uses other than irrigated agriculture. The development of coal, other minerals and industry found on Indian lands, as well as off-reservation, may require the extensive use of water. Many Indian lands do not need irrigation, many of them are not suitable for irrigation and many of the waters found on Indian lands may be sufficient to supply some purposes but not to support irrigation. None of these existing non-agricultural uses or future uses has received judicial approval or nonapproval except in very limited instances (e.g. fishing). In essence the issue is can Indians convert their present and future reserved rights to uses other than those of purely agricultural or closely related type of use related to a subsistence agricultural type of economy. Refer also to the discussion above under Needs-demands.
- 2) Quantity - The issue here, from a use standpoint, is if the amount of the right, ie. quantity, is determined by measure criteria of practicable irrigable (Arizona v. California). does this fix a total quantity that may be available for all uses or does it fix the quantity available for actual use for agricultural purposes. Related to this issue is also the question of whether uses for non-agricultural purposes will cut into the Indians' irrigation quantity, as simply changes of use from the original purpose, or whether they entitle the Indians to additional quantities over and above that needed for irrigation. As it presently stands however, for the Reservations included in this report, application of the practicable irrigable criteria or determinations of quantity would probably provide more quantity of water than has been requested or projected for non-agricultural, coal-mineral-energy related industrial uses. Thus the real issue may not be a quantity issue per se but rather the issue of type of use. It is to be added that the term use also includes the non-use aspects with respect to the Indian water right.

## Time

The issues are:

- 1) Historical - historical use. either at the time the Indian Reservation was created or from that time to the present, does not have a bearing on the use allocation to which the Indian reserved right may be applied. The only issue, although not significant for the Indian Reservations covered in this report, relates to priority of Indian rights over a prior non-Indian appropriator. Very few instances of this type affect the subject Reservations.
- 2) Existing - other than for inventory and development planning purposes the uses currently being made of Indian waters do not constrain the allocation to uses over and above those as of a given date. Such

information however, would be of value if a quantification to determine appropriated versus unappropriated were to be made of the water resources of the subject Indian Reservations. Also existing uses would not serve to place an upper limit on the quantity available for future uses under the Winters Doctrine ruling.

- 3) Future - from a use standpoint, future possible uses are indeterminate and thus will have to rely upon future judicial determinations as to both allowable uses and conversion of uses.

Other Considerations and Factors - there are a myriad of other issues that may have an effect upon the definitization of the substantive issues involved. Some have no bearing on the matter of Indian water rights, while others pose questions that may be substance for the ultimate resolution of the problem. The major ones to consider are:

- 1) Unsettled questions - while a large number of legal questions remain as to Indian water rights, and probably will remain so pending judicial interpretation or decree, there are certain major questions that remain unanswered. These are:

What is the status of tributary streams that flow intermittently on and off a given Reservation?

Can Indian water be diverted from one watershed to another for  
a. off-Reservation impoundments and uses, and  
b. on-Reservation impoundments and uses?

What is the status of impoundments on a Reservation for the purpose of regulatory releases to a downstream Reservation?

What is the status of the Tribes' rights to impound water for sale or lease to off-Reservation users?

Can a Tribe enter into agreements with users (non-Indian) to develop water resource facilities on a Reservation for non-Indian use?

- 2) Compacts and agreements - throughout the states covered in this report there exist a number of agreements which purport to govern the usage of surface waters. Foremost among these agreements is the Yellowstone River Compact. This Compact was negotiated among the States of Montana, Wyoming and North Dakota to allocate the unused and unappropriated waters of the Yellowstone River and its interstate tributaries. It is questionable whether the terms and provisions of the Compact are applicable to usage of water on the Indian Reservations in the States of Montana, Wyoming and North Dakota for the reason that Article VI of the Compact, states: "Nothing contained in this compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian Tribes, and their Reservations." As no judicial quantification has been effected that would determine the amount of the "unused and unappropriated waters" the quantity of water

available to the respective Tribes and Indian lands would be governed by the Winters Doctrine. Thus it would appear that the Compact has no effect (absent a judicial decree on quantification) on the amount of water that may be available for use by the Indians.

- 3) State law and regulation - subject to a number of minor qualifications it appears that Indian water rights are not subject to regulation or control by the respective states. The same holds with respect to regulation and control even when exercised on allotted lands owned by a non-Indian. The respective states may regulate those waters which arise on, border, traverse or underlie the lands of an Indian reservation which are "surplus" to the Indian's reserved right. (Union Oil Co. v. Walker, Cause No. 71421, Superior Court of the State of Washington in and for the County of Snohomish, unreported decision). Under the various water right laws of the respective states (ex. Montana Water Use Act of 1973) there exists the process for determining existing water rights, even though no jurisdiction (state) exists to regulate Indian reserved rights. Under what is known as the McCarran Amendment (43 U.S.C. 666) it is provided: "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." The McCarran provision has been used to bring the United States (as trustee for and on behalf of the Indians) into state water rights adjudications to assert reserved rights (United States v. District Court in and for the County of Eagle, 401 U.S. 520 and United States v. District Court in and for Water Division No. 5, 401 U.S. 527). Thus any of the respective states could join the United States as a party in a water rights determination proceeding in order to assert the Indians' reserved right.

Conclusions or Findings - based on the summary analyses set forth above it appears the major issues involved in the problem are of two types, the first being the technical issues and secondly the practical or realistic issues.

On the technical side the issues are namely legal interpretations or findings. Legal in the sense that judicial matters are involved primarily centered on determinations of the quantity of water (extent of the Indian reserved rights) that is allocable to the Indians. Virtually all of the issues revolve around the technical considerations in quantity determinations.

From the practical or realistic standpoint the majority of the issues are related to the economic and financial aspects of water uses. Water uses and non-use by the Indians of their rights are seen as a potential threat to non-Indian development of the water resources base. Expansion of the uses over and above historical or existing use, even though technically legal, represent constraints upon the future development of an area based on utilization of a water resource base whose ownership and source of supply may be in the hands of the Indians. Whether the potential threat will materialize is not known as it is dependent upon the financial capability of the Indians to fully develop the facilities and services necessary to employ the extent of their rights.

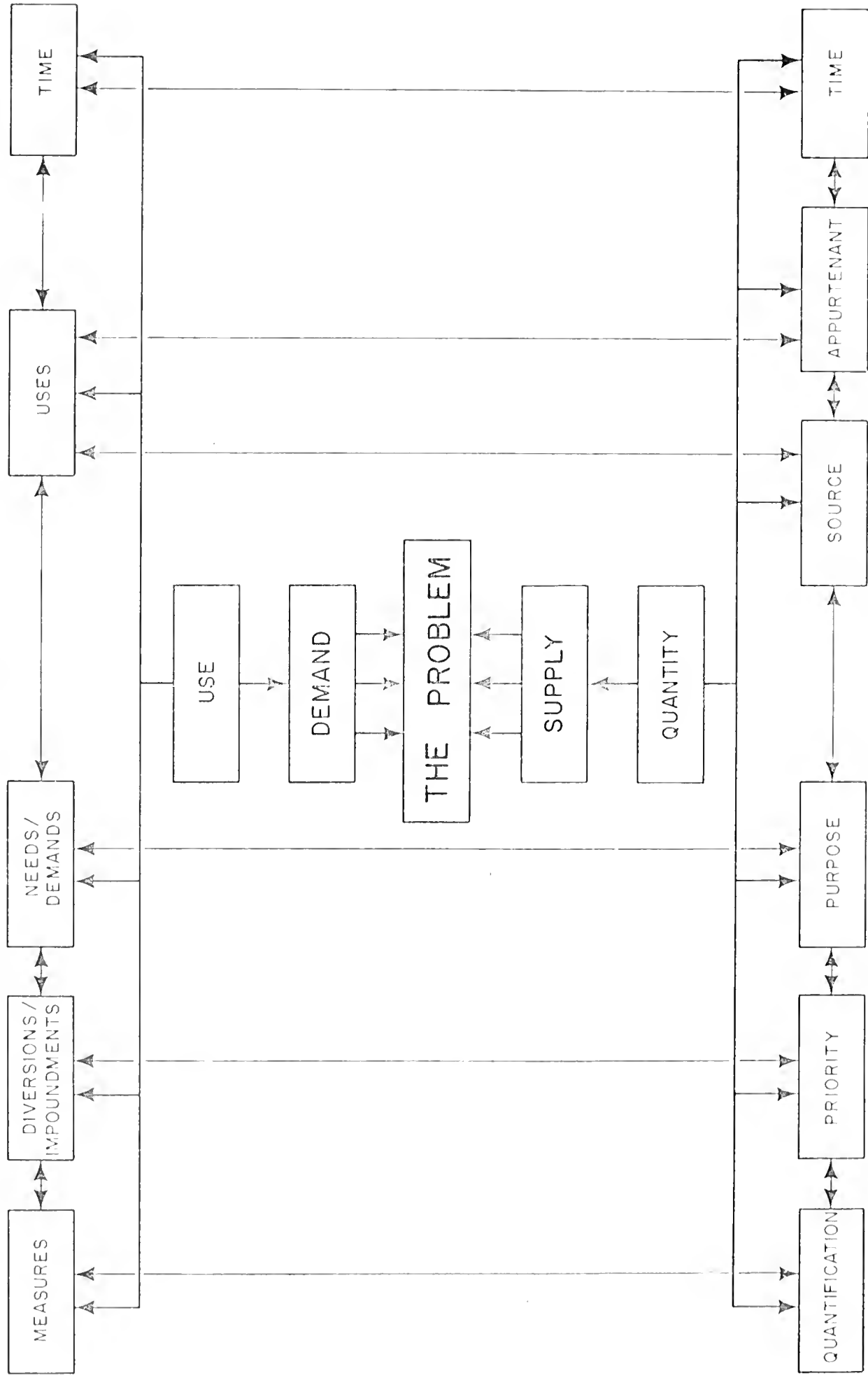


Figure 3 SUMMARY OF THE PROBLEM OF INDIAN WATER RESOURCES

An extensive analysis of water problems, including Indian Water Rights, was conducted by the National Water Commission, under the provisions of the National Water Commission Act of September 26, 1968, and their report of June 14, 1973 (Chapter 14 for Indian Water Rights) contains numerous statements of the problem, conclusions and recommendations as to resolution of the problems.

## PROGRAM SOLUTIONS TO THE PROBLEM

Baseline - As the title above implies there is no single solution to the problem. Any resolution will undoubtedly involve several or mixes of alternative methods. As a summary position, it may be stated: Despite the fact there may be uncertainties of priority, quantity, purpose and other attributes of Indian rights in particular cases, or even in most cases, there is no question but that Indian reserved rights are real. They exist, and though some may be little but a basis for litigation, others are quantified and exact. While most are unexercised rights to future uses, others are present operational realities. As to the unquantified unused rights, while they may be uncertain in quantity, it is reasonably certain that when adjudicated that quantity will be large. It is also certain that for this reason they constitute a "threat" to existing uses of water in some places, and even insofar as their exercise will fall on unappropriated water, they create very serious uncertainty that has an effect on development by others, both Indian and non-Indian.

Thus it would appear and on all sides there is probably general agreement, that there is an imperative need to inventory Indian water requirements, to adjudicate and quantify their rights so that they can be determined in relation to non-Indian rights and administered and protected within the same system.

Options for Resolution - The methods available fall into two major categories. These are:

Judicial proceedings - this option is of course always available and in the final analysis always exists as the ultimate voice in effecting a definitive resolution. The use of judicial means may also take place on a case-by-case basis or on an en masse program. The process of the judicial proceedings, and the process by which the rights are quantified and their other uncertainties removed may take several forms. One is the immediate judicial or administrative preparation of an inventory, identifying and fixing every possible use of any Indians anywhere. This has been done on the Lower Colorado River, in Arizona v. California, but there may be serious disadvantages to such adjudication procedures. Most adjudications are based on facts and evidence of past events, but quantifying Indian rights will involve the resolution of many legal uncertainties and could involve what must be only guesses as to feasibility of some future uses. Furthermore, this mass adjudication may be wholly unnecessary and indeed in many cases unwise. Immediacy may exist in some places, but there may be no necessity for action in many others. If actual conflict or potential projects are not in the offing, adjudication should perhaps wait until there is a situation in which the elimination of specific uncertainties by some form of declaratory judgement will be useful.

Quantification on a case-by-case basis can also be effected, sponsored in part by actions of the respective States. Each State could, under the provisions of the McCarran Amendment, join the United States (on behalf of the Indians) in water rights determinations proceedings in order to assist the Indians' reserved right. This provision has been used, and will probably increase in being used, to bring the United States into state water rights adjudications to assert reserved rights (United States v. District Court in and for the County of Eagle, 401 U.S. 520).

Other possibilities of quantification exist in the form of voluntary settlements by compacts, agreements, contracts, etc. These arrangements could compromise the outcome of future adjudications, yet on the other hand they create certainty.

The National Water Commission report as to Indian Water Rights recommends a number of programs aimed at quantification, even to the point of recommending litigation to be instituted by the United States in behalf of the Indian tribes to adjudicate their water rights.

Development Actions - This option involves similar considerations with respect to quantification but does not necessarily involve litigation or necessarily has to end up as a judicial proceeding. Most of the programs being pursued under this option are on outgrowth of recommendations contained in the National Water Commission Report "Water Policies for the Future" of June 1973. These types of programs are currently being undertaken by individual Tribes, as well as various governmental agencies. The basic tenet of these programs is that of "use it or lose it." In effect, the only way for the Indians to realize the full extent of their reserved rights is to develop projects that will utilize the water resources. If non-Indian users do not agree with this action then they must exercise their option to enjoin the Tribes in a litigation action to resolve the question of the respective rights and the extent thereof. This forces the action upon the non-Indian user and also places the burden of proof upon the non-Indian claimants.

The above mentioned programs are typified by the Water Resource Inventory Studies currently being sponsored and conducted by the Bureau of Indian Affairs, U.S. Department of the Interior throughout the Western United States. These programs normally follow this process:

Phase 1 - Water Resource Investigation/Base

In this phase the Bureau determines such items as: creation of the reservation, history of use, the nature of the water resources on the reservation (climate, water losses, hydrologic analyses, groundwater geology, geo-hydrology, physiography, water quality, etc.) an inventory

of the available water supply, both quantity and quality and an assessment of potential water resource developments (reservoir sites, groundwater storage, water supply systems, etc.).

#### Phase 2 - Water Requirements: Present and Future

This phase involves the identification of present and future water requirements for horizon planning periods (ex. present, Year 1980, 2000 and 2020.) Assessments are made of the reservations' land resource base, population, socio-economic conditions, economic development opportunities, alternative land use plans, projections of water uses for irrigation, municipal and domestic, manufacturing, etc. These projections in turn are converted into forecasts of water use requirements by quantity and quality of water.

#### Phase 3 - Plan Formulation

This phase involves formulation of a water use development plan and the selection of programs or projects to satisfy present and future water requirements. Based on these requirements development facilities are formulated for the reservation area that will meet the forecasted water needs. These alternative plans typically contain evaluations of benefits to costs for the programs. This phase of the study also contains recommendations (to the Tribe) for their consideration of the plans for development as to a recommended plan.

#### Phase 4 - Plan Implementation

Based on a selection by the Tribe of a plan of development the final step is to design and construct the water resource development facilities and structures necessary to implement the selected plan.

The above sequence would represent taking an inventory program all the way through from resource base to constructed facility. Detailed information on the status of such studies for the Indian Reservations covered by this report is set forth in section .

Under these types of studies it is to be emphasized that no attempt is made to conclude a quantification of the Indian reserved right in a judicial sense. The projections of future water requirements are only planning goals and objectives for development and do not purport to represent specifications of maximum future uses. In this manner the legal issue over adjudication is at least avoided, unless a non-Indian user elects to take the matter of development project implementation to court for judicial decree.



Pursuit of these types of studies also enables the Tribes to set their own destiny in that the amount of water needs forecasted for future uses on the Reservations (and in certain instances for off-Reservation uses) will depend in large measure upon the development policies adopted by the respective Tribes. Also the future levels of water use on the Reservations, quantities, location and for what purposes, will depend upon the established policies and priorities that the Indians themselves determine. In effect, the Indian people develop, evaluate the select the alternative future (ie. the level of socio-economic development commensurate with their resource development base) appropriate for their own, self-determined future state of well being.

Another option, although not to be commended or recommended, is the "take no action" alternative. In this case, neither judicial proceedings or development actions would be taken. Essentially the status quo would be maintained and the full extent of the Indian reserved rights would remain for all time subject to possible future use and under the full protection of the reserved rights entitlement as established in the Winters Doctrine and others for and on behalf of the Indian people. This course of action for the Indian people is a most dangerous method to pursue as they may lose their rights by default or non-use to the uses of non-Indian developers. "Use it or lose it" philosophy would probably prevail in the absence of protective measures on behalf of the respective Indian people.

Federal Water and Related Land Resource Programs - The Bureau of Indian Affairs, U.S. Department of the Interior is actively involved in conducting the Water Resource Inventory Studies of the types described above. A review of their plans indicates the following:

#### Planned Programs

....studies of Indian water rights and needs

	(1000's of \$)				
	<u>FY76</u>	<u>FY77</u>	<u>FY78</u>	<u>FY79</u>	<u>FY80</u>
Montana	215.8	495.8	555.0	690.0	800.0
North Dakota	64.7	69.2	50.0	40.0	30.0
South Dakota	112.0	149.7	195.0	230.0	230.0
Wyoming	20.0	22.0	25.0	30.0	35.0

The planned budgeted amounts are for: Montana - various Reservations; North Dakota - Fort Berthold and Standing Rock; South Dakota - various reservations, including Standing Rock and Pine Ridge; and Wyoming - Wind River.

## STATUS REPORT ON THE RESERVATIONS

### Montana

Crow Indian Reservation - The Crow Indian Reservation is located in South Central Montana. The Reservation is encompassed almost entirely within Big Horn County. Only the northwestern portion is in Yellowstone County. The Reservation is bounded on the south by the Montana-Wyoming border. The Reservation was established by the Treaty of 1868. The Crow Tribe was recognized by the 1851 Fort Laramie Treaty to have claim to a large area which they had long occupied covering much of present Montana and adjacent states. By successive treaties and agreements commencing in 1868, however, the Crows gradually ceded and relinquished their claim to the majority of the area, retaining only their present reservation in Montana.

Description of the Water Resource/Watershed Base - All drainages on the Reservation are in the Yellowstone River Basin. Three major drainage areas encompass the entire Reservation. Pryor Creek and its tributaries drain the west side, the Big Horn River drains the central portion, and the Little Big Horn River drains most of the east side; several smaller streams on the extreme east edge of the Reservation form the headwaters of Rosebud Creek. The Tullock Creek drainage area empties into the Big Horn River off the Reservation near Big Horn, Montana and Fly Creek and Sarpy Creek are direct tributaries of the Yellowstone River. Several smaller streams in the extreme southeastern corner of the Reservation are part of the Tongue River system.

The general topography of the Reservation is varied. Elevations vary from less than 3,000 feet (msl) in the Big Horn Valley near Hardin, to greater than 9,000 feet (msl) in the Big Horn Mountains on the southern border of the Reservation. Precipitation varies with elevation and values range from 13 to 20 inches per year.

Water Resource Inventories - The Bureau of Indian Affairs and the Crow Tribe have completed an inventory of the water supply on the Reservation for both ground and surface water. The Bureau and Tribe are currently conducting additional studies for a wide variety of purposes. (Refer to section on Current Programs for listing and description of these studies). Results of the inventory studies indicate that the average annual runoff from 21 streams on the Reservation is 362,000 A.F. This value includes all the water in the Little Big Horn River as it crosses the Montana-Wyoming border. However, none of the water which enters the Reservation in the Big Horn River is included. Approximately 1,630,000 A.F. per year enters the Reservation in the Big Horn River. The Crow Tribe has an allotment of 110,000 A.F. in the active storage of Yellowtail Reservoir.

The average annual discharge of the Little Big Horn River at the Montana-Wyoming border is 106,600 AF. The average annual discharge of the river at Hardin is 186,900 indicating a net increase of 80,300 AF which arises on the Reservation. A total of 131,200 AF/year enters the Big Horn River from major tributaries originating on the Reservation; of this value 75,340 AF/year enter Yellowtail Reservoir and 55,860 AF/year enter the Big Horn River below the dam.

The average annual discharge of Pryor Creek at the Reservation boundary near Billings, Montana is approximately 36,500 AF. The remainder of the surface runoff on the Reservation occurs in the smaller watersheds which are either direct tributaries of the Yellowstone, Big Horn, and Tongue Rivers, and Rosebud Creek which flows across the Northern Cheyenne Indian Reservation.

Minimum flow analyses have also been conducted on the 21 Reservation streams. These analyses, to determine the minimum annual flows that should occur during the lifetime of a water resources development project, indicates that the total annual discharge from streams on the Reservation would be 142,700 AF, excluding the main stem of the Big Horn River.

Water Needs and Requirements - No definitive analyses have been made of the existing and potential future water requirements for the Reservation. At the present time surface water use on the Reservation is limited almost entirely to agricultural demands, the most prominent of which is irrigation. Minor amounts of surface water are used for municipal and industrial demands.

Estimates have been made (U.S. Department of the Interior, Report on Water for Energy in the Northern Great Plains Area with Emphasis on the Yellowstone River Basin, October 1974) of future Indian water requirements by the year 2020. For the Crow Reservation the estimates are:

Agriculture	1,080,000 AF/year
	(540,000)
Wildlife	823,300
	(0)
Energy	196,500
	(196,500)
Industrial	7,000
	(1,540)
Domestic	1,800
	(400)
Recreation	500
	(110)
Totals	2,114,100
	(738,550)

The first number represents water diverted or used instream, while the figure in parentheses indicates the amount of water consumed.

The above estimates indicate that the Indian economic development requirements for water may involve a large portion of the existing annual flows of the Yellowstone River and its tributaries. These estimates were predicated on the assumption that increasing demands for goods, services, food and fiber production would encourage full development of the Indian resource base. If these demands hold and full development of the scale contemplated accrue, it is possible that the increasing demands, requirements and quantities of water estimated could be realized. It should be noted that the above estimates for the Crow Reservation should be considered to be on the maximum or high side based on a liberal interpretation of what could constitute "full development". Forecasts of Indian water requirements prepared as part of the Northern Great Plains Resource Program tend to be more conservative and less optimistic in terms of the quantities of water for Indian development for alternative levels of development.

Water Rights Problems - There are a number of potential problems with respect to water rights on/of the Crow Indian Reservation. These are:

General - effect of the Yellowstone Compact on the Tongue River; tributaries of the Tongue and Big Horn Rivers flowing intermittently on and off the Crow Reservation; diversion of water from one watershed to another, both intrastate and interstate and involving both on-Reservation and off-Reservation impoundments; impoundment on the Crow Reservation for regulatory releases to downstream Indian Reservations; Tribal rights to impound water for outright sale or lease to off-Reservation users; agreements with non-Indian users to develop required facilities on the Reservation for non-Indian use; Winters Doctrine entitlement; adjudication/quantification proceedings; pending litigation; Yellowstone River Appropriation Moratorium; Montana State Water Plan Program; Level B Yellowstone Study; and others.

The major problem areas are further described below.

Yellowstone Compact - The only Compact which apparently (emphasis added) governs the usage of Crow Reservation surface waters is the Yellowstone Compact. This Compact was negotiated among the states of Montana, Wyoming and North Dakota to allocate the unused and unappropriated waters (emphasis added) of the Yellowstone River and its interstate tributaries. A copy of the Compact, in its full text, is included in the Appendix to this report. In terms of the Crow Reservation the key aspects of the Compact are:

- 1) appropriation rights existent on January 1, 1950 are protected.
- 2) of the unused and unappropriated waters as of January 1, 1950 the quantity allocation is: Big Horn River, exclusive of the Little Big Horn River: Wyoming 80% Montana 20%; Tongue River: Wyoming 40% Montana 60%
- 3) waters of tributary streams, having their origin entirely in Montana are allocated to Montana.
- 4) under Article VI, nothing contained in the compact shall be so construed as to affect Indian water rights.
- 5) under Article X, no interbasin transfers except by States' consent and credits for imports into the Yellowstone Basin.
- 6) use of water for domestic use is excluded from the provisions of the compact.

- 7) changes in allocations to the States may be made for equitable considerations on such factors as: priorities of water rights; acreage irrigated; acreage irrigable under existing works; and potentially irrigable lands (emphasis added).

For the Crow Reservation, the waters of the Little Big Horn River were excluded from the quantity of water subject to allocation; all other tributaries of the Big Horn River are subject to allocation, since the point of measurement for allocation of Big Horn River water is below the last diversion from the Big Horn River, above its junction with the Yellowstone River; and, direct tributaries of the Yellowstone River which do not flow interstate, such as Pryor Creek, are not covered directly in the Compact.

It would appear that the Compact may govern part of the water which arises on the Crow Reservation. However, the Compact may be in conflict with the original Treaty establishing the Reservation. Also Article VI of the Compact would appear to offer full protection to the Winters Doctrine Indian reserved rights. It is possible that the only way to determine the validity of the Compact on the Crow Reservation will be by litigation.

Yellowstone River Basin Moratorium - Under the provisions of Montana Senate Bill No. 728, Chapter No. 116, Montana Session Laws of 1974 (R.C.M. 1947 Section 89-8-103 et seq.) approved effective March 11, 1974, there is a suspension of action on certain applications for permits to appropriate surface water or for changes in purpose of use in the Yellowstone River Basin for 3 years or until existing rights have been determined, whichever occurs first; reservations of water may be made under the Montana Water Use Act.

As the Indian reserved right (Winters Doctrine) is not an appropriative right governed by State of Montana law, the Moratorium is without effect as to the Crow Reservation except as to appropriations of Tribal waters that are in "excess" of their needs. Also as the Tribes' rights are based on a reserved right it is not necessary for the Tribe to file a request for a water reservation, unless of course the Tribe chooses to file a reservation request for the full Tribal Winters Doctrine entitlement.

It would appear that unless the State of Montana, within the three year period provided, determines the actual existing rights (including Crow Indian rights) under this law, that the law will be without effect as to Indian use of water. Also, it appears that if the State wants to resolve the Yellowstone water supply issue (Compact and otherwise) it will be necessary to join the United States (as trustee for the Crow tribe on their reserved rights) in any water rights determination proceeding.

Authority for this course exists under the so-called McCarran Amendment and has been used to bring the United States into state water rights adjudication (See U.S. v. District Court in and for the County of Eagle, 401 U.S. 520 and U.S. v. District Court in and for Water Division No. 5, 401 U.S. 527). Thus the process for determining existing water rights in the Yellowstone Basin under the Montana Water Use Act can proceed, even though there be no jurisdiction under the Act to regulate Crow Indian reserved water rights.

Pending Litigation - Early in 1975 the United States, acting on its own behalf and on behalf of the Crow and Northern Cheyenne Indians, brought 3 actions in the Billings Division of the U.S. District Court. These cases are:

- 1) U.S. v. Big Horn Low Line Canal filed April 17, 1975.
- 2) U.S. v. Tongue River Water Users Association filed March 7, 1975
- 3) Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Tongue River Water Users Assn. filed January 30, 1975. (Brought by the Tribe on its own behalf.)

In these cases there are over 1500 defendants named as parties, including the State of Montana.

The major issues in the cases, by both the United States and the Northern Cheyenne Tribe, are the assertion by the U.S. of its "federal reservation doctrine reserved right (for as a minimum, the Custer National Forest, the Pryor Mountains Wild Horse Range, the Big Horn Canyon National Recreation Area and the Yellowstone Dam/Reservoir.) For the Tribes (both the Crow and the Northern Cheyenne) the assertion is for the full Winters Doctrine entitlement reserved Indian right. In all of the cases no specific quantities of water are mentioned and are expressed in general terms only.

A schedule for the cases has been prepared by the Court which calls for the United States to file an amended complaint by August 1, 1975, with service on the defendants by September 15, 1975 and the defendants will have until November 17, 1975 for first appearance and filing of answers. (These dates are for the two Tongue River cases) the dates for the Big Horn Canal case are September 1, 1975, November 14, 1975 and January 2, 1976 respectively.

It is possible that the two Tongue River cases will be consolidated. There has also been discussion, with no decision as of this date, to appoint a special water master to consider the issues. Due to the magnitude of the area, the number of defendants and the substantive rights issues involved, together

with the possible number of appeals these cases could take anywhere from 5 to 15 years to settle. In the interim the status of the water supply and the extent and measures of the rights will remain unsettled.

Current Programs (for Crow Reservation)

The Bureau of Indian Affairs has commissioned a Phase 2 study (Water Needs and Requirements) on the Reservation. The study is completed and the final report is in Preliminary Draft form and is pending acceptance and approval by the Tribal Council. Pending acceptance by the Council the report will not be released by the Bureau without Tribal sanction. No scheduled date of acceptance by the Council can be estimated at the present time. Acceptance may be delayed indefinitely dependent upon the requirements and advice of legal counsel in connection with the law suits previously described in the Pending Litigation section.



Northern Cheyenne Reservation - The Northern Cheyenne Indian Reservation is located in the southeastern part of Montana, occupying portions of Rosebud and Big Horn Counties. It is bordered on the west by the Crow Indian Reservation; on the east by the Tongue River; on the south by Cook Creek and the county line; and on the north by the line dividing Townships 5 and 6 South. The Reservation is about 29 to 30 miles long in an east-west direction, and about 19 to 22 miles from north to south. The area is approximately 444,158 acres. The Reservation was established by Executive Order on November 26, 1884. It contained about 271,000 acres. By Executive Order of May 19, 1900 the Reservation was extended to the Tongue River. There have been no changes in boundaries since 1900.

Description of the Water Resource/Watershed Base - All drainages on the Reservation are enclosed in the Yellowstone Basin. Two major drainage areas encompass the entire reservation. The western part of the Reservation is drained by Rosebud Creek and its tributaries and the eastern part by the Tongue River and its tributaries.

The general topography of the Reservation is varied. The altitudes within the Reservation range from about 4730 feet (msl) near Bull Creek Lookout Tower southeast of Busby, Montana in the south-west corner of the Reservation to about 2920 feet (msl) on the Tongue River. Precipitation varies with elevation and values range from 12 to 16 inches per year.

Water Resources Inventories - As in the case of the Crow Reservation, the Bureau of Indian Affairs and the Northern Cheyenne Tribe have completed an inventory of the water supply on the Reservation for both ground and surface water. The Bureau and the Tribe are currently conducting additional studies for a wide variety of purposes. (Refer to section on Current Programs for listing and description of these studies). Results of the inventory studies indicate that in an average year 6850 AF of runoff enters the south boundary of the Reservation in Rosebud Creek. Within the Reservation boundary an additional 17,785 AF of runoff, originating on Northern Cheyenne land, enters Rosebud Creek before it passes the north boundary of the Reservation. 3600 AF of supplementary water, arising on Northern Cheyenne land, join the Rosebud below the north Reservation boundary.

An average yearly release of 317,300 AF leaves the Tongue River Dam with 334,080 AF arriving at the south Reservation boundary. Within the Reservation boundary an additional 16,750 AF of runoff, arising on Northern Cheyenne land, runs off to the Tongue River.

Based on correlation techniques, 38,135 AF of gross runoff, per year, arises on the Reservation. This runoff feeds both Rosebud Creek and the Tongue River. The 100th year drought value, assuming all streams experience drought the same year, is 12,712 AF per year. The current irrigation depletion is 1875 AF per year which gives net values of 36,260 and 10,837 AF per year, respectively.

Water Needs and Requirements - As in the case of the Crow, no analyses or projections of existing and potential future water requirements have been made for the Northern Cheyenne Reservation.

Estimates have been made in the report, "Report on Water for Energy in the Northern Great Plains Area with Emphasis on the Yellowstone River Basin" of future Northern Cheyenne water requirements by the year 2020. These are:

Agriculture	109,200 AF/year (54,600)
Wildlife	178,800 (0)
Energy	196,500 (196,500)
Industrial	300 (0)
Domestic	1,400 (300)
Recreation	300 (60)
Totals	486,500 (251,570)

The first number represents water diverted or used instream, while the figure in parentheses indicates the amount of water consumed.

The above estimates indicate that the Indian economic development requirements for water may involve a large portion of the existing annual flows of the Yellowstone River and its tributaries. These estimates were predicated on the assumption that increasing demands for goods, services, energy, food and fiber production would encourage full development of the Indian resource base. If these demands hold and full development of the scale contemplated accrue, it is possible that the increasing demands, requirements and quantities of water estimated could be realized. It should be noted that the above estimates for the Northern Cheyenne Reservation should be considered to be on the maximum or high side based on a liberal interpretation of what could constitute "full development." Forecasts of Indian water requirements prepared as part of the Northern Great Plains Resource Program tend to be more conservative and less optimistic in terms of the quantities of water for Indian development for alternative levels of development.

Water Rights Problems - Virtually all of the problems confronting the Crow Tribe are applicable to the Northern Cheyenne, with certain additional situations that are unique to the Northern Cheyenne. These are:

Yellowstone Compact - the Compact apparently governs the usage of the Tongue River. Allocations are: Wyoming 40% and Montana 60% and the point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River. Thus tributaries of the Tongue

may be subject to allocation. Rosebud Creek, a non-interstate stream, is not directly covered by the Compact. The same discussion above on the Compact applies to the Northern Cheyenne' case.

Priority Date - In applying the Winters Doctrine it would appear that the Northern Cheyenne Tribe's rights would entitle them to use water of the Tongue River which does not have a priority date earlier than May 19, 1900 and also the water of Rosebud Creek which does not have a priority date earlier than November 26, 1884. The Northern Cheyenne also have 7500 acre feet of storage space in the Tongue River Reservoir, which would entitle them to the first yield of the reservoir after the downstream natural flow rights established prior to 1900 had been satisfied.

Yellowstone River Basin Moratorium - Refer to discussion above for the Crow Reservation. Same discussion applies to Northern Cheyenne Reservation.

Pending Litigation - Refer to discussion above for the Crow Reservation. Litigation is more specific to the Northern Cheyenne Reservation than for the Crow. Litigation centers on the Tongue River.

#### Current Programs - (for Northern Cheyenne Reservation)

The Bureau of Indian Affairs has commissioned a Phase 2 study (Water Needs and Requirements) on the Reservation. The study is completed and the final report is in Preliminary Draft form and is pending acceptance and approval by the Tribal Council. Pending acceptance by the Council the report will not be released by the Bureau without Tribal sanction. No scheduled date of acceptance by the Council can be estimated at the present time. Acceptance may be delayed indefinitely dependent upon the requirements and advice of legal counsel in connection with the law suits previously described in the Pending Litigation section.

## Wyoming

Wind River Reservation - The Wind River Reservation (Arapahoe and Shoshone Tribes) is located in west-central Wyoming, in Fremont and Hot Springs Counties. It is bordered on the north by Upper Long Lake and Owl Creek; on the west by the East Fork Wind River and the Glacier Wilderness Area of the Bridger National Forest; on the south by the Shoshone National Forest and the Popo Agie River; and on the east by the Wind River Canyon and Boysen Reservoir. The Reservation is about 70 miles wide in an east-west direction and 60 miles from north to south. The area is approximately 1,900,000 acres. The Reservation was established by .  
By treaty of June 21, 1904 (the McLaughlin Agreement) the Indians ceded to the United States all of the Reservation lying north of the Big Wind River and east and south of the Popo Agie River. The purpose of the cession was to obtain money to construct irrigation ditches.

Description of the Water Resource/Watershed Base - All drainages on the Reservation are enclosed in the Yellowstone Basin. Three major drainage areas encompass the entire Reservation. The western and central part is drained by the Wind River and its tributaries; the southern part by Popo Agie and Little Wind Rivers; and the eastern part by the Bighorn River.

The general topography of the Reservation is varied. The altitudes within the Reservation range from 11,675 feet (msl) at Monument Peak in the north-west corner to almost 4,300 feet (msl) in the Wind River Canyon near Thermopolis. Precipitation varies with elevation and value average 10 inches per year (6 inches seasonally) in the more heavily populated southern area of the Reservation near Riverton.

Water Resources Inventories - Irrigation was practiced on the Reservation as early as 1885. Based on the McLaughlin Agreement development of irrigation was authorized by the Act of March 3, 1905 (33 Stat. 1016) and construction of the Wind River Irrigation Project was commenced in 1905. From this beginning the project has received intermittent appropriations by Congress for various irrigation facilities construction. By a report dated August 29, 1968 the Bureau of Indian Affairs prepared a report (Completion Report) for the basis of securing Congressional authorization for completion of the subject project. The report concluded that if the completion plan were approved and funds appropriated that the project could be completed and that approximately 12,364 acres of new land would be brought into production through completion of the project, as well as better service being provided for the 39,983 acres presently being irrigated.

As of the current date, the project has not been completed.

Water Needs and Requirements - As part of the above described Project Completion report, no detailed analyses or projections of potential future water requirements for the Tribes were made. However, as part of the final report the Tribes and the Bureau of Indian Affairs requested certain conditions with respect to the subject of Indian waters. Abstract copies, with key items noted are included in this report for information purposes.

The above estimates indicate that the Indian economic development requirements for water may involve a large portion of the existing annual flows of the Yellowstone River and its tributaries. These estimates were predicated on the assumption that increasing demands for goods, services, energy, food and fiber production would encourage full development of the Indian resource base. If these demands hold and full development of the scale contemplated accrue, it is possible that the increasing demands, requirements and quantities of water estimated could be realized. It should be noted that the above estimates for the Wind River Reservation should be considered to be on the maximum or high side based on a liberal interpretation of what could constitute "full development." Forecasts of Indian water requirements prepared as part of the Northern Great Plains Resource Program tend to be more conservative and less optimistic in terms of the quantities of water for Indian development for alternative levels of development.

Estimates have been made (U.S. Department of the Interior, Report on Water for Energy in the Northern Great Plains Area with Emphasis on the Yellowstone River Basin, October 1974) of future Indian water requirements by the year 2020. For the Wind River Reservation the estimates are:

Agriculture	1,920,000 AF/yr (960,000)
Wildlife	300,000 (0)
Energy	4,000 (4,000)
Industrial	300 (60)
Domestic	1,400 (300)
Recreation	300 (60)
Minerals	3,000 (660)
Totals	2,229,000 (965,080)

The first number represents water diverted or used instream, while the figure in parentheses indicates the amount of water consumed.

As you are aware, projected cost trends indicate a continued increase, and further delay in completing the project probably will result in greater costs to the water users. While the benefit-cost ratios of the various operating units as computed on current cost indices are favorable, it remains that any increase in costs will materially reduce the margins.

There is also the matter of confirming the Indians' right to divert and make use of the waters currently available for project development to their fullest agricultural potential. An estimate for the construction of a tunnel outlet of Raft Lake in lieu of a storage dam gave a considerable higher cost. When the time comes for final design for using Raft Lake Storage, this will be reviewed with the Tribe, and how the additional tunnel cost might be justified without being made a reimbursable cost to the water users.

Finally, the Tribal resolution makes two points in addition to supporting completion. The one calls for full development of storage dams to impound all available waters in their respective drain for be planned, and utilization of all potential irrigable lands and the reservation of Indian water to realize these ends. This is considerably beyond the scope of this Completion Report, which is concerned with completion of the existing irrigation project. The second requests reauthorization of the Wind River Project and future developments to participate in and receive benefits from the same revenues as all authorized projects under the Missouri River Basin Project. This request raises legal and perhaps other evaluation questions on which we are not now prepared to comment.

Acting  Area Director

Enclosures  
Separate Cover  
Completion Report (10 copies)

## CONCLUSIONS

Approximately 12,364 acres of new land will be brought into production through completion of the project, as well as better service being provided for the 39,983 acres presently being irrigated.

Further diversion and utilization of water will be made, as provided by the Winters Doctrine. This is in conformity with the Secretary's current policy of making full use of natural resources, and also in accord with the Bureau's responsibility as trustees of the Shoshone and Arapahoe Tribes.

Completion of the project will promote economic growth through betterment of the range and livestock programs, principally in providing supplemental forage on irrigated lands.

The storage dams contemplated under the completion plan will contribute to propagation of fish and wildlife, through sustained recreational development throughout the general area.

Anticipated managerial improvements include expansion in the size of some of the units that are now too small for efficient operation, and more efficient use of water through installation of adequate measurement facilities. General farm operations will also be improved through the Bureau and other training programs.

Added employment opportunities will be afforded, project and agricultural, resulting in improvement of the overall standard of living.

The plan for development is feasible both from an engineering and economic standpoint, the ratio of estimated annual benefits to annual costs being 2:4:1, on a project-wide basis.

The transfer of the project to the water users, as near as practicable to its completion, will result in lesser cost to the government, thus alleviating the national budget to that extent.

## RECOMMENDATIONS

1. That the plan for completion be approved, with such modifications as the Secretary of the Interior may deem proper, and that funds be appropriated for its execution, as scheduled in Chapter VI.
2. That no construction charges be made against the lands remaining in Indian ownership, as provided in the Leavitt Act.
3. That operation and maintenance costs be assessed against all lands to which deliveries are being made, such assessments being adjusted as required to reflect current needs, and in conformity with current price indices.

UNITED STATES  
DEPARTMENT OF THE INTERIOR004  
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## BUREAU OF INDIAN AFFAIRS

WIND RIVER INDIAN AGENCY  
FORT WASHAKIE, WYOMING 82514

September 3, 1969

## Memorandum

To: Area Director, Billings

From: Superintendent, Wind River

Subject: Irrigation Completion Report

The Wind River Indian Irrigation Project was Authorized in 1905. Since that time moneys have been appropriated, in varying amounts, for the construction of the Project. This method has resulted in a Project that has grown without a complete and efficient plan, and without the proper facilities for doing the construction in the best and most efficient manner.

Operation and Maintenance costs on this partially completed Project have proven to be high and assessments have been geared to the economy of the landowners and operators, rather than to the Project needs. As a result the Project is not only incomplete, but most of the original facilities have deteriorated and are now in need of replacement; 17,000 acres of land have become inundated because of poor drainage conditions, and are presently not paying their share of the O & M assessments.

The Wind River Tribal Councils, representing Indian landowners and the Wind River Waterusers Association, representing mostly non-Indian interests, have by resolutions supported the early completion of this Project. This action by these groups demonstrates the growing awareness of the importance of development and proper utilization of all the natural resources on this reservation.

The Tribes in their resolution specifically requested full development of storage dams to impound all available water in their respective drainages. It would follow that the irrigation project would only be assigned cost in accordance with the benefits derived where full development exceeded the storage requirement for irrigation purposes. The balance of cost would be deferred until assignment of



needs and plan for the construction of drainage systems and plans devised for the reclamation of the saline-alkaline soil that resulted in lack of these drainage needs.

(2) Moneys be appropriated to comply with Tribal request for investigations for the full development and utilization of their resources, including water storage, power, land development and other related projects. Other Agencies including Federal and State have conducted investigations of water resources developments. They have in many cases planned for the use of waters from the reservation to be used at other sites with very little consideration given to the needs of the Indian Tribes. If the Bureau of Indian Affairs does not exercise its trust responsibility, it is feared that these waters will be lost to the Tribes and the opportunities for economic improvement will be gone forever. This is in full accord with Commissioner of Indian Affairs designee comments to the Committee on Interior & Insular Affairs August 11, 1969. He declared that he would through a task force . . . . "to thoroughly study the Federal Trust Relationship including ways to better protect the natural resources, water rights, and trust land of the Indian people."

(3) That full support be given the Tribes and Waterusers Association in their effort and request for inclusion in the power revenues of the Missouri River Basin Project. We believe that a true and concerted effort must be made by Agency, Area and Central Offices as well as the Tribes and Waterusers for this proposition to yield any meaningful success.

(4) That immediate steps be initiated to start preparing the Wind River Irrigation Project for the ultimate transfer to some waterusers organization. Presently, we are not prepared to properly take this step. There are irrigation houses on Agency grounds, irrigation offices in Agency buildings, the irrigation shop is in an Agency building on Tribal reserve ground, irrigation program accounts are incorporated with BIA Automatic Data Center, pressure is being placed on this Agency to transfer the ADP billing and record contract from a local firm to a Federal Center, and efforts are being made to take project trucks and replace them with General Service Motor Pool equipment. These trends must be reversed and a movement toward an independent and self-sustaining Project initiated, if we have real intent in the foreseeable future of such a reorganization.

It is my hope and desire that these recommendations and comments will be received in the light of the importance in which they deserve and

RESOLUTION

Joint Business Council of the Shoshone and Arapahoe Tribes

Wind River Agency  
Fort Washakie, Wyoming

Resolution No. 1874

WHEREAS, The Shoshone and Arapahoe Joint Business Council is cognizant of the importance of the proper utilization of irrigation waters, and

WHEREAS, [The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation are the owners of and have all rights to all of the waters arising upon, flowing through or adjacent to the Wind River Indian Reservation,] and

WHEREAS, The Wind River Indian Irrigation Project has never been completed and the operation and maintenance of this type of project is not consistent with efficiency and economy.

NOW, THEREFORE BE IT RESOLVED, that this Council go on record as supporting the early completion of the Wind River Irrigation Project as outlined in the "Completion Report", and

BE IT FURTHER RESOLVED, that this Council does not approve of the partial water storage development as outlined in the "Completion Report", but [recommends that full development of storage dams to impound all available waters in their respective drainages be planned,] and

BE IT FURTHER RESOLVED: That immediately investigation be undertaken [to plan for the development and utilization of all potential irrigable lands on the Wind River Reservation] and [the reservation of Indian water to realize these ends] and

BE IT FURTHER RESOLVED THAT, the Congress of the United States of America be requested to enact legislation which would reauthorize the Wind River Indian Irrigation Project and these future developments on this Reservation to participate and receive benefits from the same Revenues as all authorized projects under the Missouri River Basin Project, and that this reauthorization specify that the present project and any future projects be under the jurisdiction of the Bureau of Indian Affairs.

CERTIFICATION

WE, THE UNDERSIGNED, as Chairman of the Joint Business Council of the Shoshone and Arapahoe Tribes, hereby certify that the Joint Business Council is composed of twelve (12) members, six (6) members of the Shoshone Tribe and six (6) members of the Arapahoe Tribe, of whom four (4) members of the Shoshone Tribe and four (4) members of the Arapahoe Tribe constituting a quorum, were present at a meeting duly and regularly called, noticed, convened and held this 20th

Water Rights Problems - Situations unique to the Arapahoe and Shoshone Tribes are:

Yellowstone Compact - the Compact apparently governs the usage of the Big Horn River. Allocations are: Wyoming 80% and Montana 20%.

Priority Date - May vary dependent upon final determination of Cession discussed below. Could be as early as July 3, 1868 or as late as June 21, 1904.

#### Legal Status of Cession

Section to be completed at a later date.

### Current Programs (for Wind River Reservation)

The Completion Report (1968) for the Wind River Irrigation Project was essentially a single-purpose (ie. irrigation) analysis and did not specifically address multi-objective plans or multi-purpose projects. The Bureau of Indian Affairs has commissioned a Phase 1 study (Water Resource Investigation/Base) on the Reservation. The study is completed and the final report is in Preliminary Draft form and is pending acceptance and approval by the Joint Tribal Councils. Pending acceptance by the Councils the report will not be released by the Bureau without Tribal sanction. No scheduled date of acceptance by the Council can be estimated at the present time.

Current plans of the Bureau are to continue the programs of completing Phase 2, 3 and 4 studies on the Reservation. For planning purposes the Bureau has indicated budget plans for completion of the studies on the Reservation as follows:

<u>FY76</u>	<u>FY77</u>	<u>FY78</u>	<u>FY79</u>	<u>FY80</u>
\$20,000	22,000	25,000	30,000	35,000

## North Dakota

### Fort Berthold Reservation

Current Programs - No inventory studies have been completed. At the present time the Bureau of Indian Affairs has retained a water resources consultant organization to prepare a Phase I - Description and Inventory Report. The estimated date for completion of this report is April 1976. Based on funding levels and availability the Bureau plans to schedule subsequent phases (ie. Phase 2, 3) for Fort Berthold in future years. Energy proposals on the Reservation are based primarily on expansion of the existing petroleum (oil and gas wells) industry. The Tribe is currently conducting a study and will prepare a report on expansion potentials for this industry. At the present time a coal company has filed an application to lease tribal lands for the development of a coal surface mining operation. No gasification or liquefaction plants have been proposed to date. The Tribe is aware of the potential for energy developments on the Reservation and are active in promoting water studies as part of their overall economic development objectives for the Tribe.

### Standing Rock Sioux Reservation

Current Programs - No inventory studies have been completed. The Bureau of Indian Affairs has programmed the conduct of such studies during the period FY 1977-FY 1980. Completion of such studies will be dependent upon budgetary authorizations.

## South Dakota

### Pine Ridge Reservation

Current Programs - No inventory studies have been completed. The Bureau has programmed the conduct of such studies during the period FY 1977-FY 1980. Completion of such studies will be dependent upon budgetary authorizations.

## SUMMARY

Conflicting Demands in Face of Limited Supplies - A major objective of this report has been to present and clarify the basic or underlying facets in Indian water rights. Additionally, an objective of the study was to analyze the basis of the water resources base of the Reservations to support future levels of Tribal economic development and the alternative choices for water uses and concomitant future demands for water.

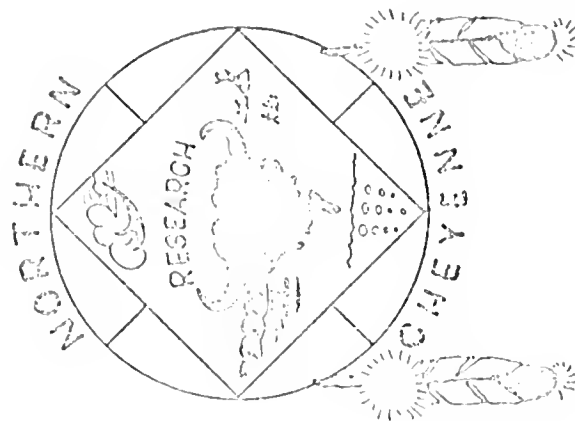
Presently, in the judgement of non-Indian users of waters originating from the Reservations, a threat is felt to exist to their present water uses because of the prospective diminishment of surface water supplies that would result from Reservation economic expansion. Likewise, the Indian people of these Reservations feel threatened not only from uncertainties of prospective actions, but also from the documented non-Indian opposition to unlimited (ie. open-ended or as needed) expansion and use of water on the Reservations. They also fear that their long-term survival on the Reservations is dependent upon economic development program advancement which is tied in effect to this implied limitation of water use.

The Yellowstone River carries an average of 8.8 million acre-feet of water out of Montana each year. Much of this water is available for use in Montana; however, quantification of the "surplus" water is difficult to determine. The Yellowstone River Compact divides the waters of the Bighorn, Tongue, Powder and Clarks Fork-Yellowstone Rivers between Wyoming and Montana and also contains certain provisions affecting North Dakota water users. Wyoming has estimated its share to be 2.4 million acre-feet annually. The Crow and Northern Cheyenne Indian Tribes have undetermined legal claims to water for use on their Reservations, as do the Indian Tribes occupying the Fort Berthold, Standing Rock Sioux and the Wind River Reservations. Preliminary studies for those Reservations in Montana indicate an additional 1.0 million acre-feet more than is presently being used may be used by the year 2020. No such estimates are available on the Reservations in North Dakota, South Dakota and Wyoming but it is apparent that future demands will be far in excess over current uses, particularly if major economic development programs, including energy development projects, are pursued aggressively by the respective Tribes which appears to be the case. (Refer to following page which describes ongoing programs currently underway on the Northern Cheyenne Reservation in Montana; additionally the Crow Tribe has established a Tribal Office of Coal Research to actively develop the mineral resources of their Reservation for the economic benefit of the Tribe.)

Identification of surplus water has become a critical issue in the Yellowstone Basin because of possible and likely future coal development, minerals resources development expansions, energy related developments and expansions in irrigated agriculture, as well as intensified demands and conflicts for use of water in recreation, hunting and fishing, municipal and various other uses.

[illegible][illegible]

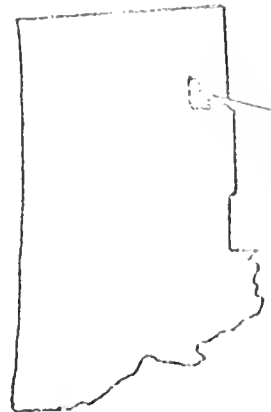
Supreme Court  
Clerks' Office



Office of the  
Attorney General



2000



NO OTHERS. OTHERWISE  
RESEARCH ON PROJECT  
BOX 248  
BUDDY, MONTANA  
(406) 592-3615/3313

"We would just like to know what is going to happen to us."

proposed by  
the Council, Regions

The Northern Cheyenne Research Project (NCRP) is an ongoing research effort which operates under the direction of the Northern Cheyenne Tribal Council and the people of the Northern Cheyenne Tribe. It does not function as a part of, nor is it controlled by, the Bureau of Indian Affairs. Its principal purpose is to assess in depth the potential impacts to Northern Cheyenne land and people resulting from proposed energy development on the reservation.

In a time of increasing national need for secure energy sources, the Northern Cheyenne people find themselves owners of an estimated 4-5 billion tons of coal. Their 433,434 acre reservation, located in Southeastern Montana, has already undergone extensive exploration by some of the largest coal companies in the world.

Federal and corporate pressures on the Cheyenne to allow development of their coal resources is steadily increasing. As a result, the 2,926 Cheyenne people living on the reservation have begun to take action to preserve their cultural and environmental heritage.

The Tribal Council and people of the Northern Cheyenne Tribe established the Northern Cheyenne Research Project in 1973. The NCRP is funded by the Office of Native American Programs in HEW and is one of the first tribally controlled research projects in existence. ONAP funding of \$325,000 has been the sole financial support of the Project to date. The U.S. Environmental Protection Agency has now joined with ONAP and is supporting a three-year water/coal research program as part of the NCRP. EPA funding support level for this program is \$639,000.

Project staff are currently developing research programs aimed at securing reliable environmental, social, legal and cultural information. The data gathered from these research programs will be disseminated to the Tribe, providing the information base needed by the Northern Cheyenne to critically assess proposed energy development on the reservation and how it will affect their lives. Decisions of far-reaching consequence will soon be made.

To develop and promote adequate environmental programs that will sufficiently protect the Northern Cheyenne reservation land and people from the internal and external pressures brought about by industrial development.

To aid in establishing and documenting the existence of cultural and historical sites on the reservation.

To investigate and make recommendations for countering adverse socioeconomic effects on the Northern Cheyenne people as a result of energy development.

To evaluate the quantity and quality of water and coal resources on the reservation and assess potential impacts of proposed resource development.

To aid in the establishment of a viable economic community on the reservation.

To evaluate and make recommendations for improving the Tribal judicial system and legislation.

To promote open lines of communication between the Northern Cheyenne Tribe and State, Federal and private agencies. To maintain an active role at the state and federal level in presenting the concerns of the Northern Cheyenne people.

To promote positive attitudes among Northern Cheyenne as an aid in maintaining survival as an ethnic group.

To promote and aid in establishing alternative means of self-improvement through education.

To aid in maintaining Tribal identity and sovereignty.

## GEOLOGIC INVESTIGATION

Stripable coal reserve maps and reserve estimates are being prepared to predict the extent of the coal reservoir, the areas of possible extensive coal development, and as an aid to the establishment of a sound energy management strategy.

## HYDROLOGIC INVESTIGATION

Existing water resource information is being compiled and a three-year study of the potential impacts of energy development to this quantity and quality of the Northern Cheyenne water resources is being initiated. In addition to the generation of baseline hydrologic data, detailed hydrologic analysis of the reservation's aquifer systems will be prepared.

## SOCIOLOGIC INVESTIGATION

A detailed social impact research program is presently underway. Socio-economic conditions on the reservation are being studied. It is hoped that such an analysis will provide insight into how to maximize potential benefits from energy development on and near the reservation, while at the same time providing maximum protection to Northern Cheyenne culture.

## LEGAL INVESTIGATION

Legal matters are being conducted to determine Northern Cheyenne property rights on the reservation system is being carried out in an attempt to improve its ability to adjust to pressures of population growth. Tribal legislation is being studied and new laws formulated to cope with anticipated legal problems resulting from potential energy development.



Data from Montana alone indicates that energy-related companies have water filings, federal options and applications that could deplete approximately 1.3 million acre-feet of water each year; expanded irrigation in Montana could consume an additional 1.6 million acre feet annually; and the Montana Department of Fish and Game has requested a 7.0 million acre-feet reservation for instream flow protection. Figure 4 portrays how possible future yearly requirements compare to the average annual flow and a low water year. Extreme variability in monthly and yearly flows of the Yellowstone River mainstem and tributaries can now cause water supply problems for water users in some areas. While the chart only depicts possible future water requirements for Montana, the same intensification of uses and competing demands for Yellowstone water are also evident for North Dakota and Wyoming in various degrees and ranges.

It is obvious to all that not all forecasted water needs can be met during an average water year on the Yellowstone. Something or someone has to give. There simply is not enough water (given the forecasts) in the basin to completely satisfy all possible water users, whether Indian or non-Indian. This factor, coupled with the unknown or unquantified future Indian uses and quantity questions, causes uncertainty in the outcome.

Compromises or striking balances appears to be mandatory if orderly development is to proceed.

Advocacy vs. Adversary - In depicting the conflict areas the typical representation is that of an adversary contest. In effect it is non-Indian water users versus Indian water users. Until recently, the economic development and water resource development programs of the non-Indian developers (most frequently with federal and/or state funding-construction assistance) were pursued with aggressiveness for the exclusive benefit on the non-Indian sector of the economy. At the present time, the Indian Tribes recognize that to enhance the economic opportunities for the tribes and to provide a strong economic base for their Reservations that it will be necessary to more fully develop their (ie. Winters doctrine reserved rights) water resources. Part of this awareness was fostered by recommendations made in the National Water Commission Report on Water Policies for the future as well as by the Water Resources Inventory Studies sponsored by the Bureau of Indian Affairs in the exercise of their responsibilities as trustee on behalf of the Tribes. In this capacity the Bureau has become a tacit partner for the Tribes in an advocacy role to encourage utilization of their reserved water rights. In addition to the Bureau's programs, most of the Tribes have undertaken independent studies, plans, and programs to promote the utilization of the extent of their rights (either full or partial). Under all of these actions there is a definite advocacy position evolving. The Indians are advocating development of their Reservations for a variety of water uses and quantities, basing their programs on the utilization of their reserved rights.

Figure 1 depicts how possible future yearly requirements compare to the average annual flow and a low water year. Extreme variability in monthly and yearly flows of the Yellowstone River mainstem and tributaries can now cause water supply problems for water users in some areas. Obviously, not all forecasted needs can be met during an average water year.

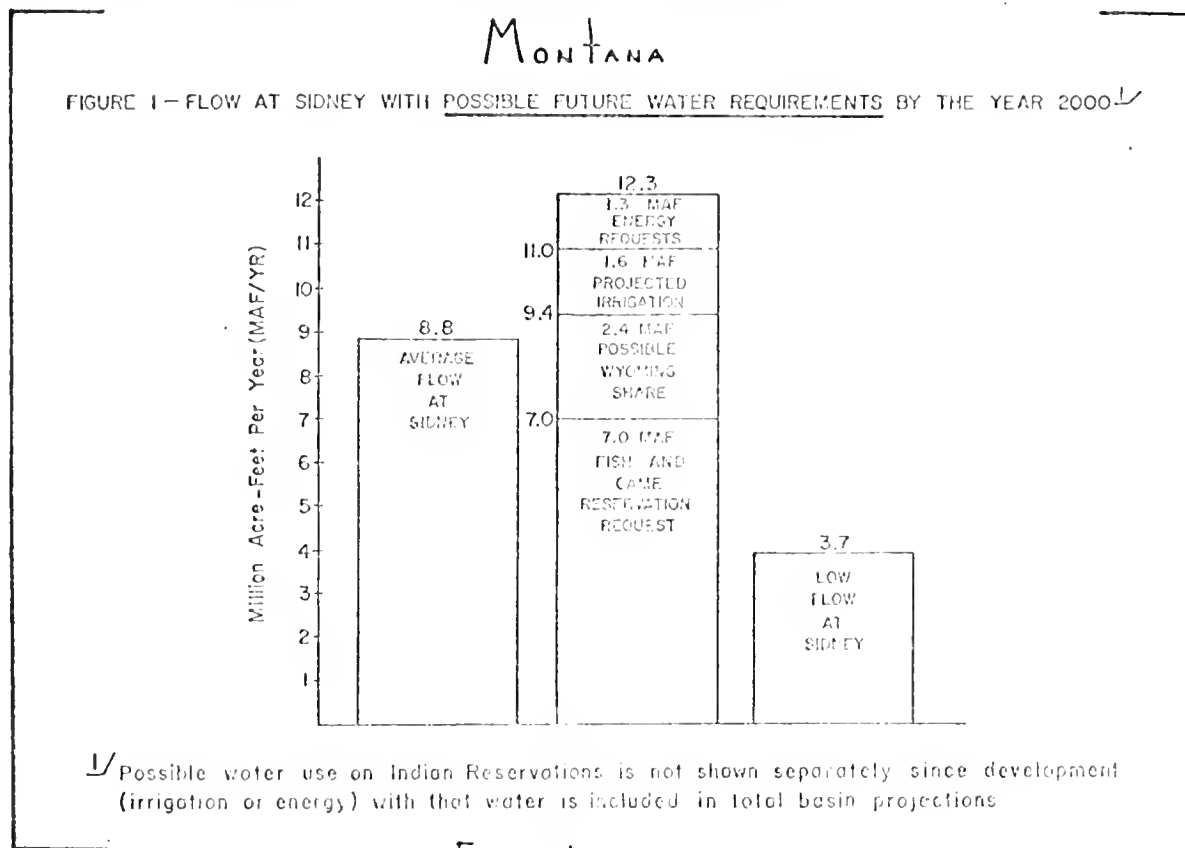


Figure 4

#### Potential Reservoir Sites

New reservoirs could alleviate existing and future water supply problems in some areas, but they are not a total solution for the conflict over Yellowstone water. Construction of large reservoirs on the Yellowstone River could make available, for energy or irrigation use, about 2.0 MAF of water and still largely meet the instream flows recommended by the U.S. Fish and Wildlife Service, which total 4.35 MAF annually at Sidney (4). Map 1 shows some potential reservoir sites in the basin.

The Allenspur dam site alone could furnish 1.5 MAF of water annually and still provide a measure of fishery protection through releases for instream flows as recommended by the Fish and Wildlife Service. However, the reservoir would inundate 35 miles of "Blue Ribbon" trout stream and 37,000 acres of predominantly irrigated hay land. A Joint Resolution passed by the 1974 Montana Legislature declares that construction of this dam would be contrary to state goals and objectives.

In the face of the advocacy position being taken by the Tribes the non-Indian adversary is placed in a situation whereby if he does not concur in the Indian water development programs he may have to resort to judicial litigation in the hopes of obtaining a favorable (ie. to the non-Indian user) adjudication from the courts. This of course assumes that compromise or agreement outside of a litigation action could not or would not be effected.

Constraints - The primary situation that the unsettled status of Indian water rights imposes on decision-making at all levels is that of constraining the formulation, promulgation and implementation of effective water resources management policies, plans and programs. Given this indefinite baseline, it has been virtually impossible to develop any coordinated comprehensive joint (Indian/non-Indian, federal/state, etc) water and related land resources policy approaches and planning alternatives. The unknowns of the situation have also been instrumental in delaying and perhaps even preventing implementation of needed solutions to many of the water resource problems and issues. The following statements are extracts from a recent plan (Level B, Flathead River Basin, Pacific Northwest River Basins Commission, June 1975) and indicate the typical conclusions reached with regard to the subject of Indian water rights.

"The Confederated Tribes claim ownership of all waters...and are attempting to determine the extent of those waters and the use of them upon the reservation. At the present time, the status of water control, use and ownership is not adequately defined to the satisfaction of the tribes, the state, or the federal government. (Emphasis added) Another problem which must be resolved concerns the conflict between tribal and non-tribal water rights. While both...are planning to inventory water use sometime in the future, no schedule has been developed to inventory water use or water rights in the basin. The conflict between tribal and non-tribal water rights within the Reservation requires resolution."

Rather than serving as the basis for development of program actions these types of findings only serve as restatements of the problems and issues, which in most cases are already well known and documented. The situation is further aggravated by the existence of extremely fragmented program responsibilities and institutional arrangements in the field of water resource management. No single entity has the authority or responsibility to cope effectively, on an integrated, comprehensive basis with solutions to the problem. Tribes, the federal government, state government, the courts, the users, the general public, and many, many others, all have a "piece of the action" with respect to management and utilization of the water resource base under stress.

If a resolution to the diverse problems and issues is to be gained in order to achieve effective development and implementation of water resources management policies, plans and programs, the constraints have to be overcome.

Problems and Potentials - Statement of a summary for the problems can be best expressed as "demands for water for alternative competing uses." With a limited resource base or supply the increasing demands are imposing pressures that are causing the increased emphasis on effecting solutions to the problems. This heightened awareness, as viewed in the context of a demand and supply approach, is describable as:

Demand - the problems relate primarily to allocation and control issues. The Indian Tribes are electing to allocate their water rights to alternative uses other than only for irrigated agriculture. The Indians maintain that their rights may be used for any and all uses that will foster the economic development of the respective Tribes without regard to a non-Indian implied constraint that would limit the uses to traditional or historical uses for only irrigated agriculture and certain other limited uses. This Indian attitude, coupled with the indefinite or unquantified nature of the Indian water rights, has forced the non-Indian sector (both institutionally and from a user standpoint) to call for programs of control over the resource base. Control in this context ranges from attempts to impose limitations on uses by the Indians, law suits to adjudicate the quantity of the rights, and a host of other efforts all designed to bring the Indian water rights and resources under the system of non-Indian controls (eg. state water right system, permits, appropriation rights, etc.).

Supply - in this problem area a strange dichotomy exists between the non-Indian and Indian sectors. Part of the contrast is myth and part is real. The issues relate to consumptive use versus non-consumptive uses. On the one hand the non-Indian sector is pushing to limitations on the use of Indian waters to restrict the use to irrigated agriculture as opposed to expansions for industrial or energy related uses. Yet from a water withdrawal and net depletion basis, irrigated agriculture represents the largest consumptive use area of the water resource base. (Refer to following charts that portray the situation graphically. Data shown is for Montana only, but would be consistent for other states on the same relative basis). Both the quantity and net depletion of other categories of water uses and withdrawal are so small relative to agriculture ( particularly net depletion) that there is no real comparison or evidenced threat from these uses, either current or projected future. It is in this area that the myth is most evident. Expansion of Indian irrigation would have a much more serious impact upon the

# TOTAL ANNUAL WATER WITHDRAWALS

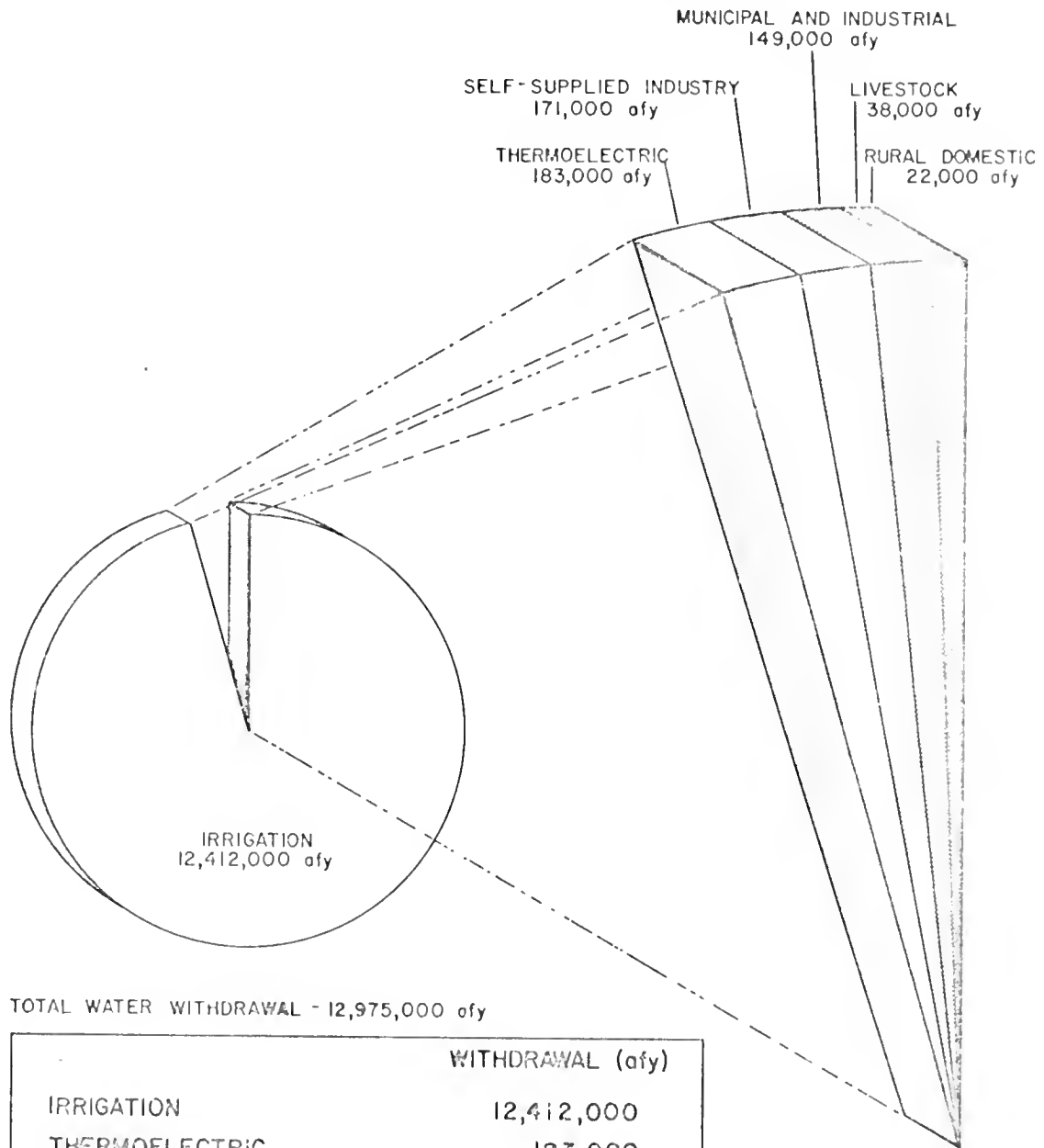


Figure 1

## IRRIGATION

Irrigation water is that which is applied to the land in an effort to grow crops for human or livestock consumption. Rainfall is normally not sufficient for good crop growth, and 95.7% of the water withdrawn in Montana is for irrigation.

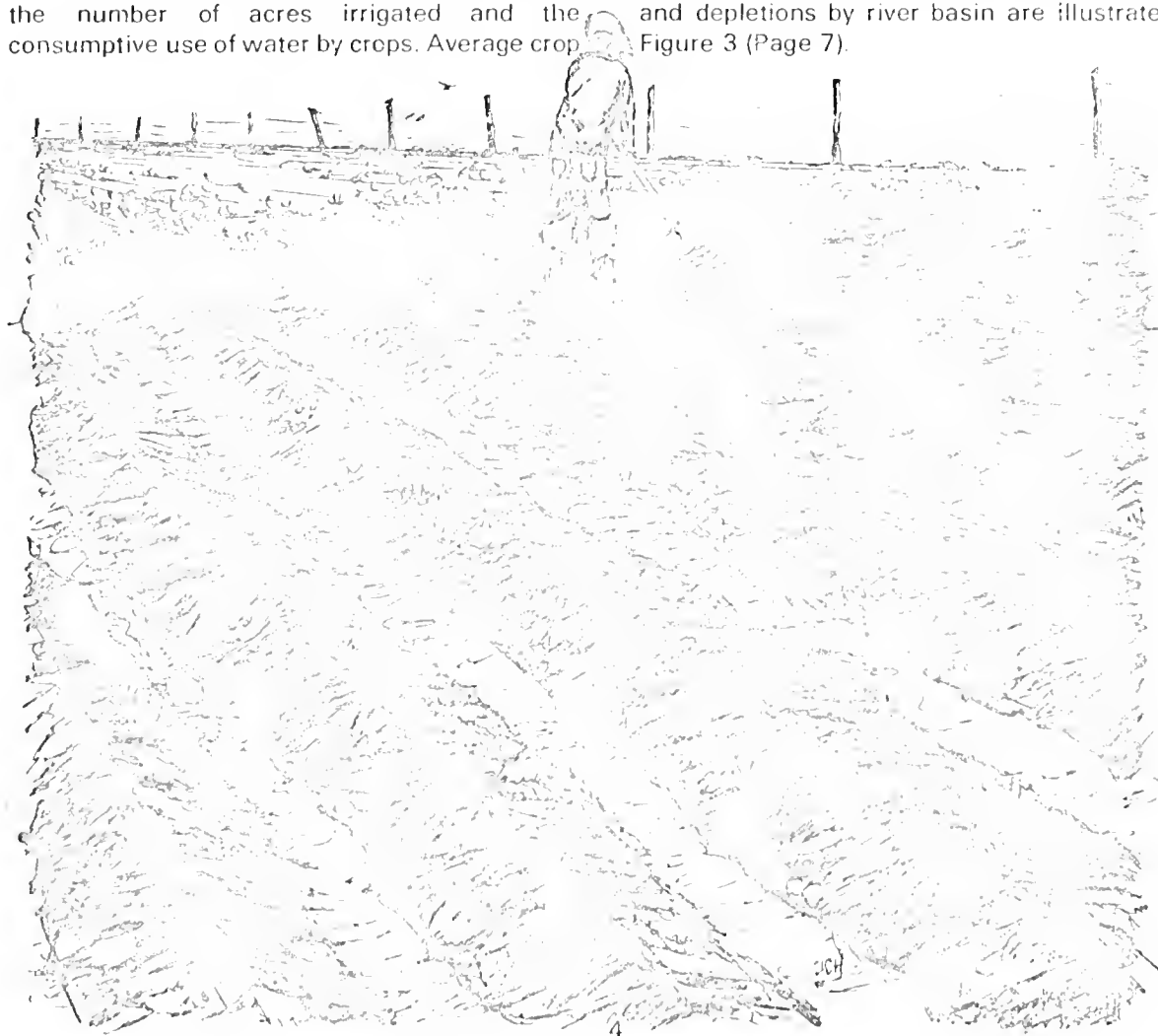
Irrigation began as early as 1842 and has increased steadily, until now over 2½ million acres are fully or partially irrigated. Although gravity ditch and lateral systems have been by far the most extensively used, sprinkler systems are becoming more and more popular, using easily portable aluminum pipe with pumps or gravity feed drawing from streams, ponds, or wells.

Total water use for irrigation amounts to 12.4 million acre-feet of water (22,165 mgd) over a six-month irrigation season each year. Surface water sources yield 99% of this water, while 1% is ground water. Figure 2 (opposite) illustrates the net depletion and return flow from irrigation water use in Montana.

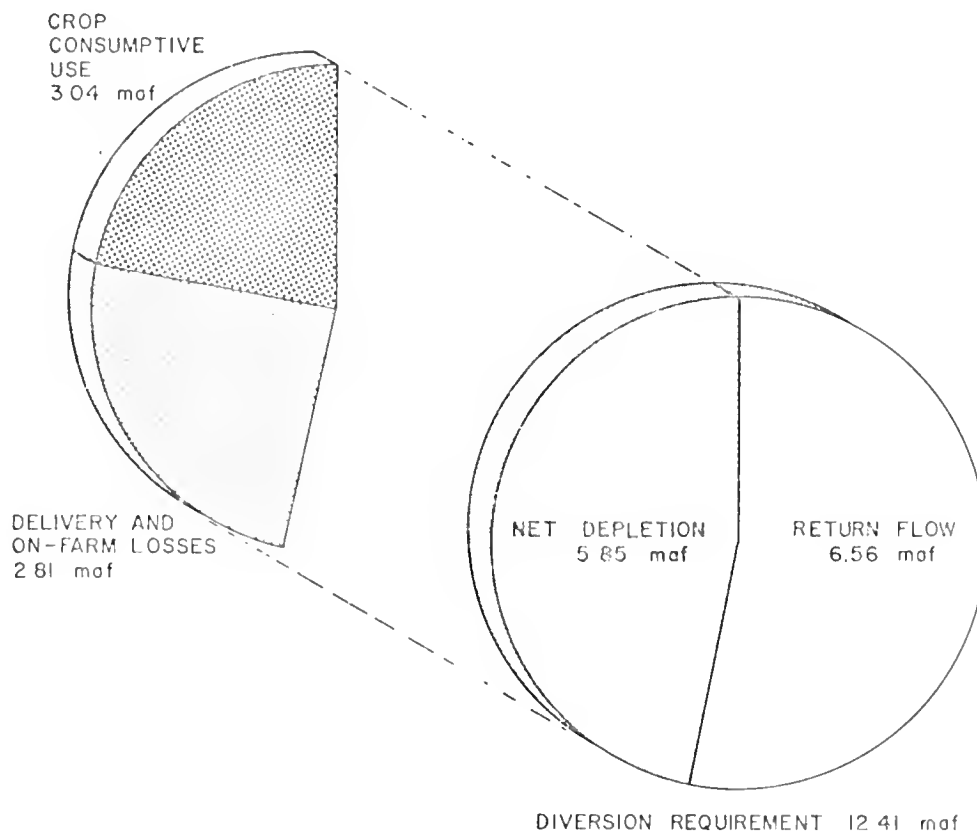
Irrigation water use estimates were based on the number of acres irrigated and the consumptive use of water by crops. Average crop

requirements were obtained from information supplied by the Soil Conservation Service of the U.S. Department of Agriculture. Requirements for diversion are more than double consumptive use, resulting in a return flow of 53% of the total withdrawal. Consumptive use varies with irrigation efficiency and such factors as the soil, crop, growing season, temperature, and precipitation. In the early months of April, May, and June, as well as the later months of September and October, the need for irrigation water is less than during the hot, dry months of July and August.

Total acres irrigated, diversion requirement, net depletion, and return flow by county are presented in Table 2 (Page 6), while diversions and depletions by river basin are illustrated in Figure 3 (Page 7).



# IRRIGATION WATER USE



DIVERSION REQUIREMENT	12.41 maf
RETURN FLOW	6.56 maf
NET DEPLETION	5.85 maf
CROP CONSUMPTIVE USE	3.04 maf
DELIVERY & ON-FARM LOSSES (Evaporation, Evapotranspiration, & Deep Percolation)	2.81 maf

Figure 2

**TABLE 2 WATER USE FOR IRRIGATION (BY COUNTY)**

County	Acres Full Service	Acres Partial Service <sup>1</sup>	Acres Full Equivalent	Diversion Requirement (Acre-Feet/Year)	Net Depletion <sup>2</sup> (Acre-Feet/Year)	Return Flow (Acre-Feet/Year)
Beaverhead	268,895		268,895	1,087,130	512,582	574,548
Big Horn	65,569		65,569	394,334	185,929	208,405
Blaine	58,838	11,147	64,411	385,759	181,885	203,874
Broadwater	42,642		42,642	226,604	106,844	119,760
Carbon	96,362		96,362	559,719	263,907	295,812
Carter	700	43,443	22,421	140,756	66,366	74,390
Cascade	45,978		45,978	251,991	118,814	133,177
Choteau	13,011		13,011	77,241	36,419	40,822
Custer	22,745	14,597	30,043	202,277	95,374	106,903
Daniels	1,050	1,852	1,976	12,584	5,933	6,651
Dawson	16,722	3,714	18,579	118,347	55,801	62,546
Deer Lodge (c)	12,832	375	13,010	62,927	29,670	33,257
Deer Lodge (m)	8,469	142	8,540	22,064	10,496	11,568
Fallon	300	2,577	1,588	9,959	4,696	5,263
Fergus	20,274	773	20,660	80,286	37,855	42,431
Flathead	27,725		27,725	117,690	55,491	62,199
Gallatin	131,309	1,034	131,826	642,571	302,972	339,599
Garfield	1,100	8,435	5,317	40,661	18,682	21,979
Glacier	25,897		25,897	95,213	44,893	50,320
Golden Valley	2,683	2,454	3,910	27,934	13,171	14,763
Granite	36,693		36,693	145,556	68,629	76,927
Hill	9,828		9,828	61,559	29,025	32,534
Jefferson	26,280		26,280	127,416	60,077	67,339
Judith Basin	18,862		18,862	86,086	40,589	45,497
Lake	111,208		111,208	640,351	301,925	338,426
Lewis and Clark (c)	1,899		1,899	6,694	3,156	3,538
Lewis and Clark (m)	36,326		36,326	183,441	86,492	96,949
Liberty	3,500	2,847	4,923	26,576	12,530	14,046
Lincoln	7,370		7,370	44,143	20,813	23,330
Madison	123,525	3,190	125,120	632,580	298,261	334,319
McCone	5,933	4,519	8,192	44,457	20,961	23,496
Meagher	44,424	3,151	45,999	211,719	99,825	111,894
Mineral	1,736		1,736	10,681	5,036	5,645
Missoula	34,847		34,847	205,534	96,909	108,625
Musselshell	5,752	2,177	6,840	47,101	22,208	24,893
Park	63,522	415	63,729	374,359	176,510	197,849
Petroleum	11,853	2,945	13,325	83,849	39,535	44,314
Phillips	51,503	35,637	69,321	436,816	205,959	230,857
Pondera	124,618		124,618	363,886	171,572	192,314
Powder River	10,741	22,445	21,963	131,527	62,015	69,512
Powell	63,262		63,262	249,776	117,769	132,007
Prairie	10,158	3,769	12,042	71,257	33,598	37,659
Ravalli	104,569		104,569	584,473	275,579	308,894
Richland	39,836	1,919	40,795	223,306	105,289	118,017
Roosevelt	13,676	4,346	15,849	94,853	44,723	50,130
Rosebud	22,338	5,038	24,857	158,649	74,803	83,846
Sanders	29,147		29,147	178,180	84,012	94,168
Sheridan		4,191	2,095	10,833	5,108	5,725
Silver Bow (c)	1,765	664	2,097	10,327	4,869	5,458
Silver Bow (m)	4,144	433	4,360	24,086	11,356	12,730
Stillwater	34,721		34,721	217,110	102,367	114,743
Sweet Grass	56,383	551	56,658	340,527	160,558	179,969
Teton	141,014		141,014	619,730	292,203	327,527
Toole	3,078	4,865	5,510	25,976	12,248	13,728
Treasure	19,340	1,891	20,285	131,180	61,851	69,329
Valley	52,757	17,339	61,426	348,534	164,334	184,200
Wheatland	29,280	7,337	32,948	152,534	71,920	80,614
Wibaux	141	150	216	1,200	566	634
Yellowstone	95,655		95,655	549,029	258,867	290,162
<b>STATE TOTAL</b>	<b>2,314,785</b>	<b>220,362</b>	<b>2,424,966</b>	<b>12,411,938</b>	<b>5,851,827</b>	<b>6,560,111</b>

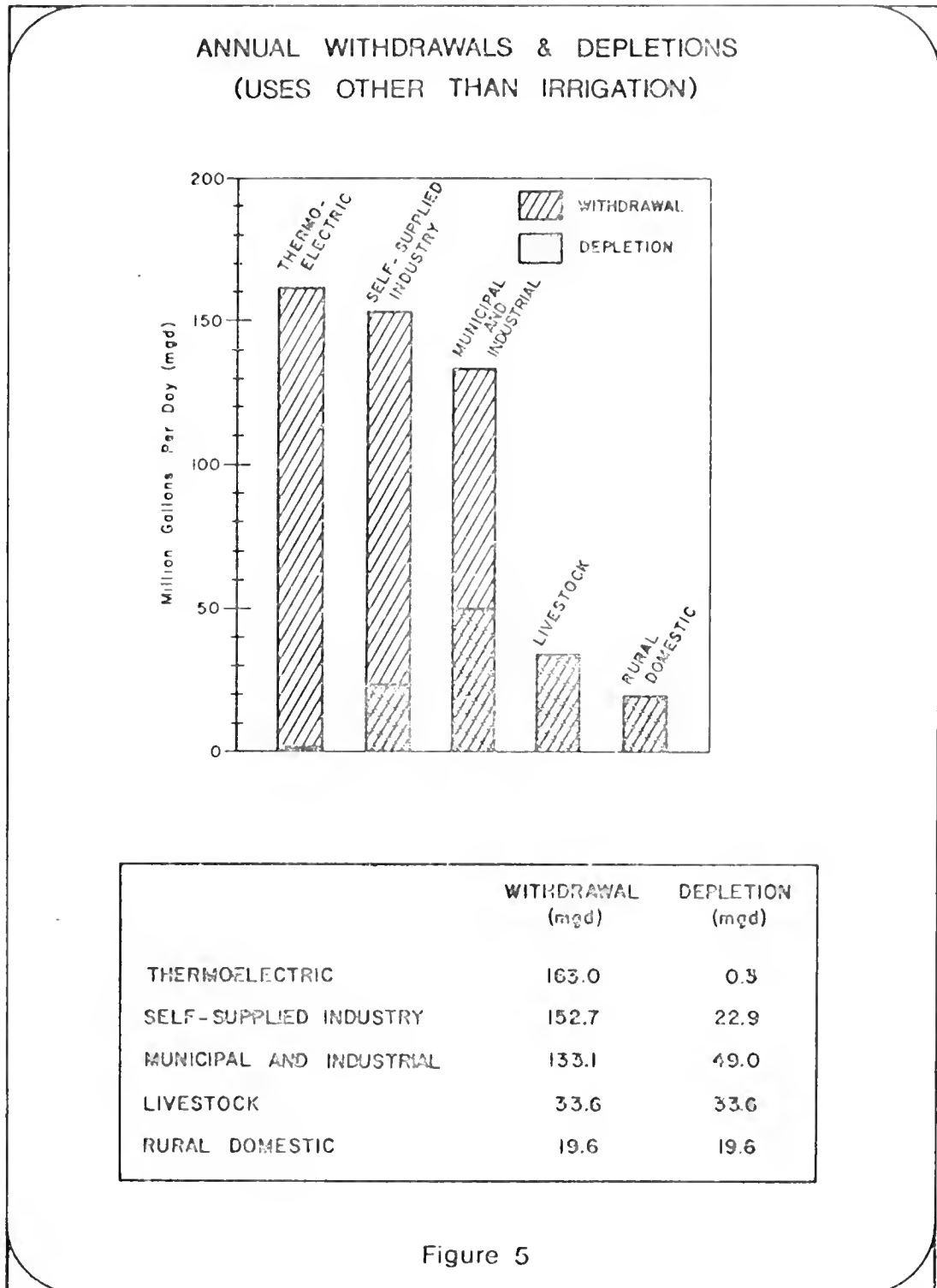
c = Columbia Basin  
m = Missouri Basin

<sup>1</sup> Acres partial service are those which receive less than the full water requirement  
<sup>2</sup> Crop requirement, delivery loss, evaporation



of supply, while Figure 5 (below) illustrates the depletions of these same withdrawals.

Table 3 (Page 10) and Figure 6 (Page 11) show withdrawals for uses other than irrigation by county and by river basin, respectively.



**TABLE 3 WITHDRAWALS OF WATER BY COUNTY**  
**(USES OTHER THAN IRRIGATION)**  
(million gallons per day)

COUNTY	COMMUNITY WATER SYSTEMS			RURAL DOMESTIC G.W. <sup>1</sup>	LIVE-STOCK	SELF-SUPPLIED INDUSTRY			THERMO-ELECTRIC	TOTAL
	G.W. <sup>1</sup>	S.W. <sup>2</sup>	TOTAL			G.W. <sup>1</sup>	S.W. <sup>2</sup>	TOTAL		
Beaverhead	.639	.558	1.197	329	1.750	107		107		3 383
Big Horn	235	.791	1.026	497	1.240		1,010	1 010		3 773
Blaine		.703	.703	362	1,040	027	.063	090		2 195
Broadwater	.310		.310	.115	.390					815
Carbon	.512	.679	1.191	.349	.710					2 250
Carter	.080		.080	.129	.800					1 009
Cascade	1.016	13.719	14.735	609	.980	1 814	9 102	10 916		27 240
Choteau	.355	.674	1 029	325	.740		.009	.009		2 103
Custer	.390	1 558	1 948	310	.790	436		.436		3 484
Daniels	.350		.350	.141	.260					751
Dawson	.489	.991	1 480	302	.620				1.0	2 402
Deer Lodge	3,768	.658	4 426	.383	.130	.008	31 900	31 908		36 847
Fallon	.516		.516	.128	.360					1 004
Fergus	2 006		2 006	.526	1 230		.072	.072		3 834
Flathead	2.846	2 447	5 293	1 962	.380	4 230	.288	4 518		12 153
Gallatin	.695	5 125	5 820	1 048	1.020	.626		.626		8 514
Garfield	.047		.047	.127	.810					984
Glacier	.611	.741	1.352	.473	.460	.130	.019	.149		2 434
Golden Valley	.100		.100	.067	.280					447
Granite	.059	.236	.295	.161	.370	.118	.091	.209		1 035
Hill	.964	.277	1.241	.510	.420	.041	.019	.060		2 231
Jefferson	.939	.021	.960	.186	.270	1 350		1 350		2 766
Judith Basin	.146		.146	.202	.630	.009		.009		987
Lake	.738	1 109	1 847	.886	.820	.228		.228		3 781
Lewis and Clark	.214	8.116	8 330	.885	.550	.501	1 190	1 691		11 456
Liberty		.293	.293	.116	.190					599
Lincoln	.117	2 313	2 430	1 183	.100	.173	2 880	3 053		6 766
Madison	.508		.508	.072	1.140	.056		.056		1 776
McCone	.095		.095	.405	.560					1 060
Meagher	.024	.666	.690	.077	.700	.040	.008	.048		1 515
Mineral	.527	.023	.550	.151	.220	.078		.078		999
Missoula	9 308	15 243	24 551	.946	.240	18 150	.600	18 750		44 487
Musselshell	.493		.493	.131	.440					1 064
Park	.361	1 763	2 124	.318	.610	.026		.026		3 078
Petroleum	.061		.061	.040	.380					481
Phillips	.489		.489	.264	1 160					1 913
Pondera	.210	.689	.899	.294	.420	.043		.043		1 656
Powder River	.146		.146	.176	.730		.008	.008		1 060
Powell	1.494	.477	1.971	.035	.630	.028		.028		2 664
Prairie			0	.175	.390					565
Ravalli	1 589	.137	1 726	1 054	.680	.374		.374		3 834
Richland	1 223		1 223	.434	.710	.048	1 175	1 223	30.0	33 590
Roosevelt	.982	.181	1 163	.240	.460	.915		.915		2 778
Rosebud	.671	.333	1 004	.068	.810		.049	.049		1 931
Sanders	.300	.655	.955	.321	.270	.082		.082		1 628
Sheridan	.517		.517	.272	.350					1 139
Silver Bow	.018	12 320	12.338	.183	.080	3 000	23 100	26 100		38 701
Stillwater	.634		.634	.279	.610					1 523
Sweet Grass	.855		.855	.139	.570					1 564
Teton	.733		.733	.348	.700	.006		.006		1 787
Toole	.855		.855	.152	.280	.762		.762		2 049
Treasure	.125		.125	.070	.250					445
Valley	.953	.760	1 713	.441	1 000	.034	.241	.275		3 429
Wheatland	.307		.307	.093	.420	.008		.008		828
Wibaux	.060		.060	.082	.260					402
Yellowstone	.187	16.976	17 163	.062	1 250	.482	46 970	47 452	132.0	197 927
<b>TOTAL</b>	<b>41.867</b>	<b>91.232</b>	<b>133.099</b>	<b>19.633</b>	<b>33.660</b>	<b>33.930</b>	<b>118.794</b>	<b>152.724</b>	<b>163.0</b>	<b>502.116</b>

<sup>1</sup> G W - Ground Water

<sup>2</sup> S W - Surface Water

# WATER CONSUMPTION

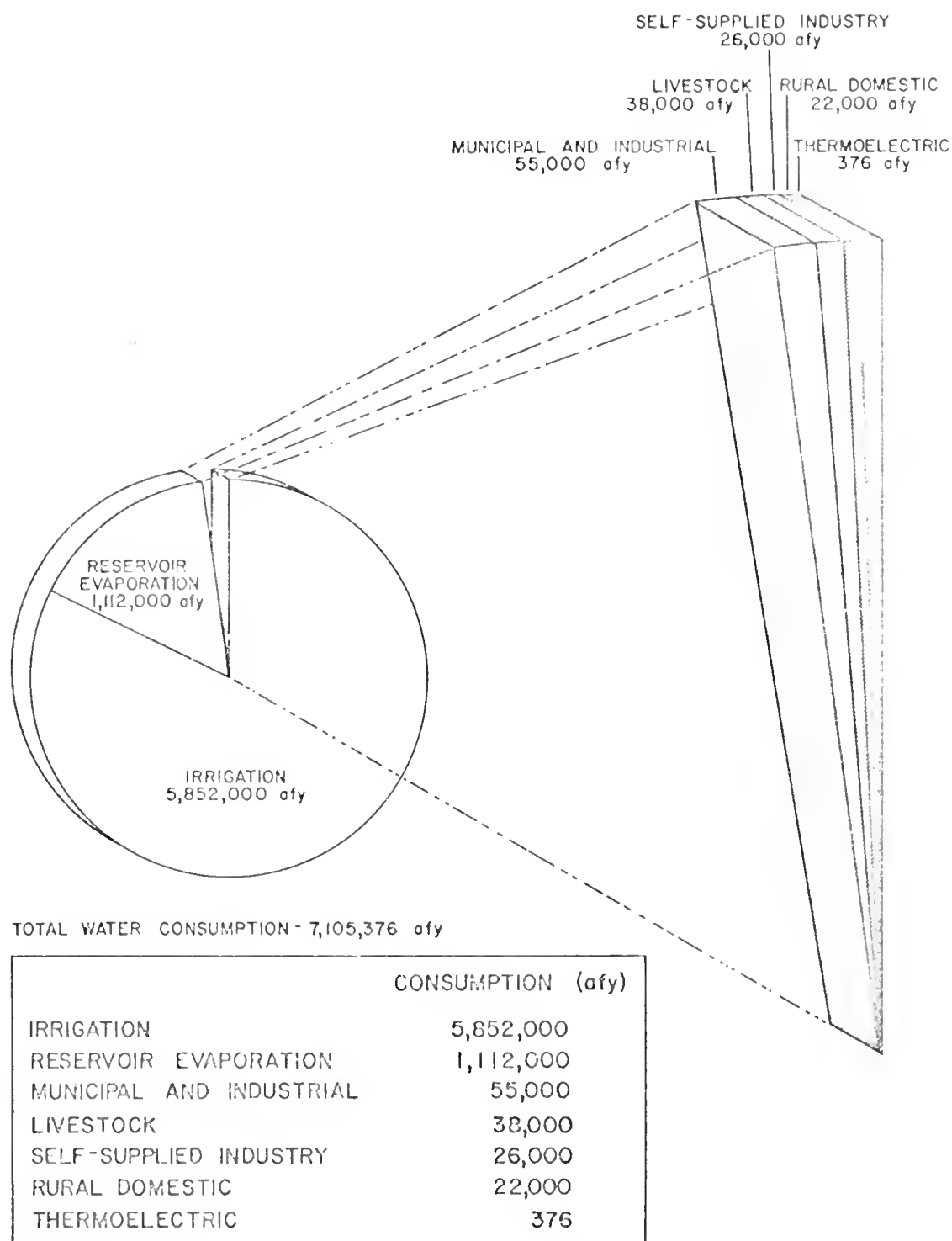
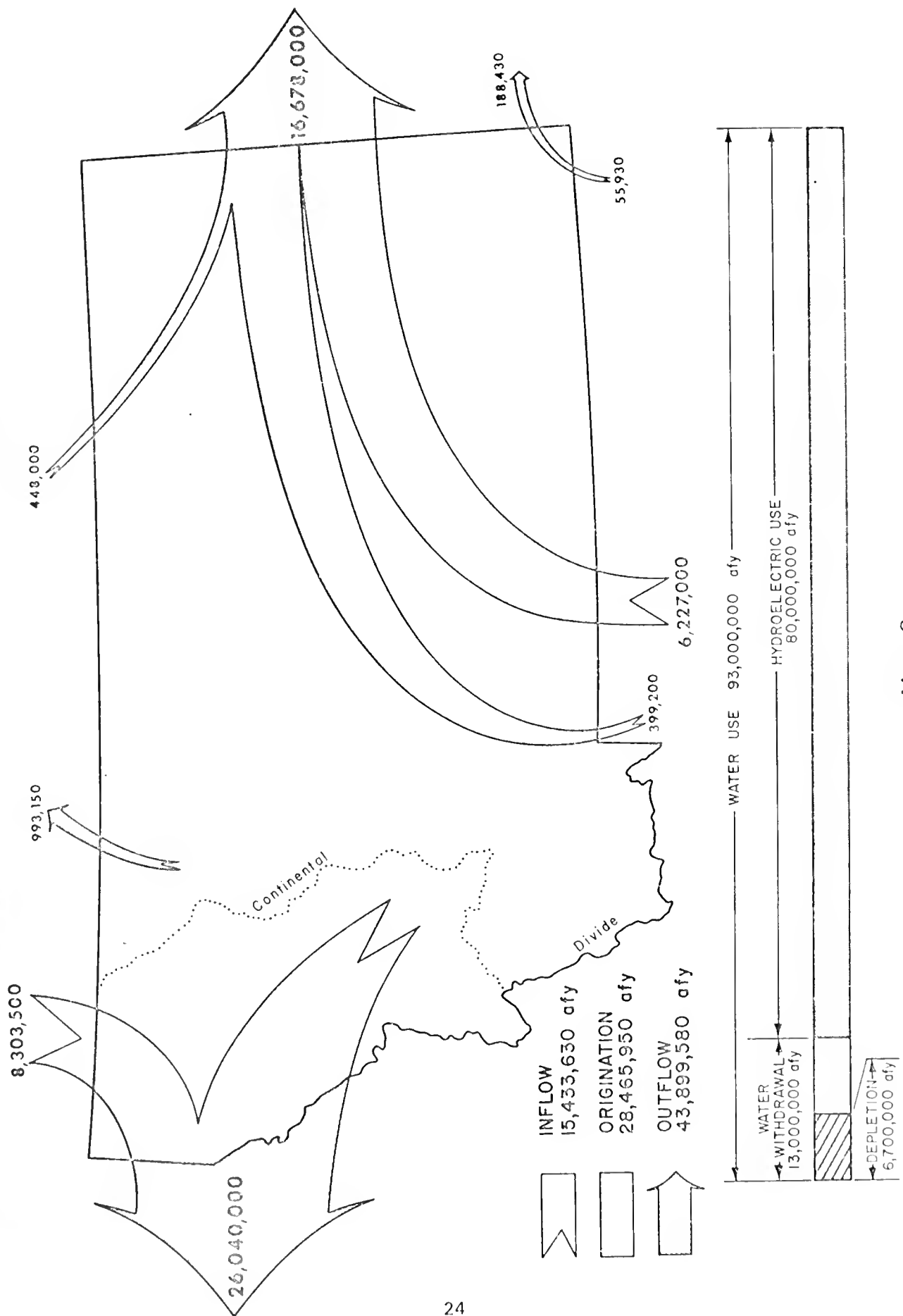


Figure 10

# SUMMARY OF WATER SUPPLY AND DEMAND



Map 3

## CONCLUSION

Montana's water supply is not a fixed quantity, but depends upon the amount of precipitation and the quantity of water that can be stored by reservoirs along the state's streams. Total outflow of water from Montana averages nearly 44 million acre-feet per year, or over 39,000 mgd. Present consumptive uses of Montana's water resource, exclusive of evaporation, amount to only 6.7 million acre-feet per year, most of which occurs during the summer irrigation season. Tables 8 and 9 (below) summarize water use for the state and the three major river basins. Figure 10 (opposite) illustrates water consumption.

Irrigation uses the largest amount of water, at least during the summer season. On a yearly average, irrigation accounts for 95.7% of all water removed from the source of supply. Thermoelectric power, self-supplied industry, municipal, industrial, and rural domestic users, and livestock utilize the remaining 4.3% of water withdrawals.

Water for hydroelectric power generation constitutes the largest measurable instream use of the resource. Over 80 million acre-feet of water (72,000 mgd) flow through the 21 hydroelectric plants in Montana (exclusive of Libby Dam). Recreation, fish and wildlife, and the dilution and transportation of wastes are other important uses for instream water supplies.

Storage of water and the evaporation which occurs from water surfaces divert large quantities of water both temporarily and permanently from the available supply.

Map 3 (Page 24) illustrates total water availability and use in Montana. Total use figures indicate that Montana's available water supply is utilized more than twice before leaving the state.

**TABLE 8 SUMMARY OF WATER USE IN MONTANA**

Use	Withdrawn		Consumed	
	(mgd)	(afy)	(mgd)	(afy)
Irrigation*	11,082.3*	12,412,000	5,857.4*	5,852,000
Thermoelectric	163.0	183,000	3	376
Self-supplied Industry	152.7	171,000	22.9	26,000
Municipal and Industrial	133.1	149,000	49.0	55,000
Livestock	33.6	38,000	33.6	38,000
Rural Domestic	19.6	22,000	19.6	22,000
	11,584.3*	12,975,000	5,982.8*	5,993,376

\* Irrigation figures in million gallons per day are averages over a one-year period. MGD figures should be doubled to represent per day withdrawals during the six-month irrigation season.

**TABLE 9 WATER WITHDRAWALS IN MONTANA BY RIVER BASIN**

Use	Columbia Basin		Missouri Basin		Yellowstone Basin		Montana	
	mgd	afy	mgd	afy	mgd	afy	mgd	afy
Irrigation*	2,053.6*	2,211,000	6,071.6*	6,710,000	2,946.5*	3,491,000	11,071.7*	12,412,000
Thermoelectric	0	0	0	0	163.0	183,000	163.0	183,000
Self-supplied Industry	85.3	96,000	17.2	19,000	50.2	56,000	152.7	171,000
Municipal and Industrial	56.4	63,000	47.2	53,000	29.5	33,000	133.1	149,000
Livestock	3.9	5,000	19.0	21,000	10.7	12,000	33.6	38,000
Rural Domestic	7.3	8,000	8.8	10,000	3.5	4,000	19.6	22,000
	2,206.5*	2,383,000	6,163.8*	6,813,000	3,203.4*	3,779,000	11,573.7*	12,975,000

\* Irrigation figures in million gallons per day are averages over a one-year period. MGD figures should be doubled to represent per day withdrawals during the six-month irrigation season.

## STORAGE AND EVAPORATION

Many water uses, both instream and withdrawal, are better served on a year-round basis if some facility for storing water is available to smooth the natural fluctuations in stream flow. Thus, many of the hydroelectric plants in Montana draw on storage reservoirs, and many recreational waters are man-made lakes or ponds. Likewise, many irrigation projects rely on reservoir storage to provide adequate water supplies for crop growth.

In 1968, over 240 reservoirs in Montana each stored 50 acre-feet or more water for such uses.<sup>10</sup> Most of these reservoirs were developed for hydroelectric power, flood control, or fish and wildlife, but many serve such withdrawal uses as irrigation and stock water as well. In addition, over 1,000 other impoundments have been constructed for the sole purpose of irrigation or stock water, and some of these are also used for recreation. The distinction between reservoirs for withdrawal use and for instream use is not important, nor in fact very clearly defined, because most water supply reservoirs also serve such uses as conservation and recreation.

The total area of these water surfaces is about 900,000 acres, or 1,400 square miles, and

the total storage is 37.5 million acre-feet. Since annual evaporation from shallow water surfaces in Montana averages between 35 and 47 inches,<sup>11</sup> total evaporation from all reservoirs constitutes a very large quantity of water. This quantity has been estimated at over 1 million acre-feet per year (993 mgd)<sup>12</sup> from reservoir surfaces alone. Although much water would be conserved if evaporation from reservoirs could be entirely suppressed, not all evaporation water loss can be charged directly to the reservoirs. Some was occurring before the reservoirs were built, in the form of evaporation and transpiration from the land areas and stream surfaces later flooded.



<sup>10</sup> Montana Water Resources Board, *Montana Register of Dams*, Helena, Montana, October 1968.

<sup>11</sup> U.S. Department of Agriculture, Soil Conservation Service, *Pond Evaporation*, Technical Notes, Bozeman, Montana, February 1974.

<sup>12</sup> Western U.S. Water Plan, *Montana Report*, State Study Team, August 1973, p. 29.

water resource base of the Yellowstone Basin than would alternative uses. If the non-Indian sector would encourage non-expansion of Indian agriculture, coupled with conversion of reallocating Indian water uses to non-agricultural alternative uses it is apparent that net savings and increases in total supply availability would be realized. Thus in effect the non-Indian sector could be the beneficiary of increased supplies of water for non-Indian consumptive uses as a direct result of Indian curtailment of using water for irrigation purposes.

The reality of what could happen, and is probably a likely occurrence, is that the Indian Tribes, in pursuit of an expanded economic base on their Reservations, will expand the uses of water for both agricultural consumptive uses and for non-consumptive (relative) alternative uses (ie. industrial and energy related uses). As this happens the myth becomes a real world situation that can impose definite constraints on the non-Indian use and development of the water resources base in the Yellowstone Basin.

From a potentials standpoint it should be obvious to the non-Indian sector that the Indian people will be expanding their economic base on the Reservations and will be actively pursuing economic development of their resources. The acculturation of the Indian into the majority non-Indian society will only serve to intensify the demands upon the water resource base. Further, it should be anticipated by the non-Indian sector that resort to a judicial proceeding in the expectation of gaining a more favorable water determination than could be obtained by other means will probably not be achieved. It is highly unlikely that in these days of heightened social conscience that the courts would unreasonably limit the use rights of the Indians to anything less than a quantum approximately the full extent of their reserved water rights.

It then appears that a new order is in the offing. This will call for a recognition primarily by the non-Indian sector that Indian water rights (both extent and quantity) are real and cannot be ignored or by-passed by the non-Indian sector. Accordingly the new order will probably evolve into and call for a non-Indian and Indian sector partnership on the water resource base with both sectors sharing equal rights and management roles in the partnership arrangement. The interests are joint, the base is joint and the association must reflect this mutuality. This arrangement will be most apparent in the development of water resources management policies and plans whereby the only viable course will be a non-Indian and Indian integrated and comprehensive approach to planning and implementation decision-making.

## CONCLUSIONS

Findings - The general situation prevailing with respect to the subject of Indian water resources problem can best be described as one of chaos. There is no one central theme or direction to resolution of the problem. There are of course the two polarized groups, the non-Indian and the Indian. With respect to the non-Indian sector resolution attempts fall into two major categories of: users - litigation by downstream users to adjudicate and quantify the extent of the Indian use and rights is the usual course of action pursued. Typically these actions are on a stream-by-stream or case-by-case basis rather than on a broader watershed or basin area. The second category are actions by administrators. Within this grouping are actions taken by state agencies to administer the state system of water rights. As the matter of Indian water rights is outside of the state system these actions normally are met by frustration and ultimately end up in litigation. The litigation can be commenced by the state under the parens patriae principle whereby the state represents its non-Indian water users or the state may intervene in an adjudication commenced by others, including adjudications initiated by the United States and/or by Indian tribes. The other administrative grouping would be actions initiated by the United States and/or the respective Tribes to exercise and quantify the extent of the rights.

The Indian sector resolution actions fall into three categories. The first is the assertion by the Tribes of the full extent of the implied Winters Doctrine right, ie. all of the waters. Based on this assertion, and in the absence of a challenge, the Indians are free to develop their Reservation and the water resource to the maximum extent possible subject only to financial limitations and constraints. Second, is the litigation avenue referred to above, either through actions by the United States in exercising its trustee role or by individual actions of the Tribes on their own behalf or in combination. The causes of litigation action can be both initiated by the United States or the Tribes or can be of a response/answer type in actions commenced by others (non-Indians, state, etc.) The third resolution area is represented by the "phased water resources studies" being sponsored by the Bureau of Indian Affairs in their trust capacity. These studies are an attempt to define and quantify (not a judicial adjudication) the extent of the Indian water resources and to develop a plan for the use of these waters in conjunction with other tribal resources. Again, in the absence of a challenge these studies, if followed through to implementation, would result in Indian water resource development programs and projects that would utilize the Indian water resources (not necessarily the full extent as postulated in the Winters Doctrine).

In both of the situations described above there appears to be no consistent pattern and very few attempts to coordinate the actions or courses being pursued. It is virtually a case-by-case approach. Each situation either stands or falls on the circumstances evidenced. No coordinated or systematic, comprehensive program approach to problem resolution is being taken. As a result chaos prevails.

Conclusions - With the prevailing situation as described above, it can be stated with some degree of certainty that the expectation of problem resolution is extremely limited. The ever present threat is that polarization will continue and that each of the respective groups will continue to go their separate ways to the satisfaction of neither group. Continuation of this avenue of approach will not provide any substantial improvement in coming to grips with the problem and effecting sound water resources management policies and plans.



Maintenance of the status quo, which is essentially an institutional problem, will severely limit the capability to effect any meaningful change either for Indian or non-Indian. Unless modifications are made in the "resource management system" the amount (supply) and use (demand) of water for development activities of all types will be limited.

The opportunity exists for the institutional entities and systems to make positive progress to resolve the problem. With recognition and acknowledgement of the problem by all parties it should be possible to develop a method for effecting meaningful change to the mutual benefit of all. The options available all center on formulation of a joint Indian/non-Indian participatory approach to development of a comprehensive resource management plan that encompasses all users and uses of the water resource base. A summary of some of the available options is set forth below.

Options - The options available are numerous and it is doubtful whether any given solution could be based on use of only a single course of action. Portions of each option will probably be utilized in effecting an optimum resolution. Among the options are:

- 1) no legal action by the Tribes - continues with Bureau of Indian Affairs phased studies and ultimately develop the Indian water resources
- 2) case-by-case approach - continue phased Bureau studies and bring legal actions as required, either on an initiated basis or in a challenge/response mode.
- 3) initiate legal actions - litigation could be instituted by the United States in behalf of the Tribes, the Tribes could commence such actions on their own behalf, or a combination of these. Purpose is to adjudicate the Indian water rights.
- 4) state determination of rights - the respective states could initiate actions to join the United States (individually and on behalf of the Tribes) into state water rights adjudications (the McCarran Amendment).
- 5) integrate resolution program into State Water Plan Programs.
- 6) integrate resolution program into Yellowstone Basin Level B Study and Plan
- 7) undertake a separately funded study program to do an in-depth study of Indian water rights problems in the Basin (refer to Appendix for MRBC Proposal to Water Resources Council on this subject)

Recommendations - While the subject of Indian water rights is of key significance to the objectives of the Yellowstone Level B study, the resolution of the issues as outlined above, are beyond the scope, time and financial resources available. Of the options listed Options 1 through 4 are currently being pursued by various entities; the method of accomplishing and the approach to be utilized by the various States under Option 5 is undetermined as of this date; and Option 7 is not recommended due to the magnitude of the legal issues and vagaries of quantification efforts. The proposal to the Water Resources Council referred to above in Option 7 on Indian Water Rights was rescinded and withdrawn by the Missouri River Basin Commission in May 1975 pending recommendations that may accrue out of the Yellowstone Level B study. Thus of the options noted above only Option 6 remains as a viable course of action to pursue under the Level B study. Accordingly, the method and approach outlined below is recommended for the subject study program.

Yellowstone Level B Study  
Indian Water and Related Land Resources Problems  
Approach and Methodology

Approach: the basic approach to be used in the study program will follow that of the Water Resources Council as adopted in the National Assessment and Framework Update Programs.

Methodology: the procedural methods to be used for each of the Reservations in the study area will:

- 1) determine the existing quantities of water being utilized by source and by type/category of use. This data will be considered as the base year 1975 amount.
- 2) projections will be made by type/category of use for the planning horizon years of 1985 and 2000. The projections will be based on development amounts that are based on criteria of ability to develop and utilize plus the WRC guidelines and criteria being followed in the National Assessment and Framework Update Programs.
- 3) the projections prepared as above, will be used in the development of alternative plans for the study area and in the formulation of the recommended plan for the study area.

In the formulation of the recommended plan for the area, including the subject matter of Indian water needs and requirements, the criteria contained in the WRC Principles and Standards will be followed. More specifically this means that for an Indian water development plan, program, or project to be included in the Economic Development (ED) component of the Plan, the project analysis must include, as a minimum, reconnaissance level cost and benefit information to enable assessment and display of beneficial and adverse effects. In the absence of such data the project may be accommodated as an increment in the Environmental Quality (EQ) portion of the Plan. Under either circumstance the Indian water development projects can be included in the Level B Yellowstone Plan. Thus failure to meet the NED criteria will not exclude the projects from inclusion in the Plan.

The amounts indicated above appear to exceed the physical amount of water available in the Yellowstone, for both an average year and especially for a short or drought year. It must be borne in mind however the figures are only estimates or forecasts and do not purport to represent what the actual demands will be in a given year. Further the figures in most instances represent a maximum forecast for the intended purpose rather than a reasonable level of development or feasible, attainable situation. Dependent upon the ultimate development level obtained the final amounts could vary significantly lower than those forecast. Additionally certain of the forecasts only indicate options or applications, rather than actual appropriations or commitments, which will require certain development commitments or administrative actions, in order to represent actual dedication to intended uses. Certain of the described use purposes do not necessarily represent all consumptive use (e.g. in-stream flow for fish, non-consumptive energy uses-cooling, etc.) and thus the figures may unduly represent higher consumptive use of the resource than may actually be the realized case situation when an actual use occurs.

If the amounts specified represent actual future needs and should they be realizable then it is apparent that the limited resource quantity base of the Yellowstone will be subject to shortages or limitations on quantities. If this be the future case, then compromises striking balances and/or allocation priorities will be required if optimum orderly development is to proceed.

## APPENDIX

## APPENDIX

Missouri River Basin Commission Proposal to Water  
Resources Council to Study Water Requirements Associated  
with Indian Lands in the Missouri River Basin

Measure of Practicable Irrigable

Summary of Major Indian Water Rights Court Cases

Indian Water Rights Vocabulary

Selected Water Rights References

Yellowstone Compact

# Missouri River Basin Commission

John W. Neuberger  
*Chairman*

William C. Brabham, Iowa  
*Vice-Chairman*

Suite 403 • 10050 Regency Circle • Omaha, Nebraska 68114

*"A Presidential State-Federal River Basin Commission"*

February 19, 1975

Mr. Warren D. Fairchild  
Director  
Water Resources Council  
2120 L Street, N.W.  
Washington, D.C. 20037

Dear Warren:

In accordance with WRC Budget Guidelines 77-A, transmitted herewith are 30 copies of proposals for two Level B studies to be funded in FY 1977. These include in order of priority (location shown on attached map):

- (1) Level B Study of the James River Basin, North Dakota and South Dakota
- (2) Level B Study for Tri-City Area, Missouri

It is requested that \$5,000 be made available to develop a more detailed PTS for Item (2).

At its meeting on February 5, 1975, the MRBC reaffirmed the high priority of a proposed special study of the Missouri River Flood Plain within a five-state area from Gavins Point dam in South Dakota to the mouth of the Missouri River in the State of Missouri. MRBC recommends that WRC provide the relatively small amount required for this timely study in FY 1977--only \$40,000 (see attached one-page description).

Also the MRBC requests a small amount (\$40,000) either from FY 1977 funds or from other funds to develop a Plan of Study (POS) for a special study of the Water Requirements Associated with Indian Lands in the Missouri River Basin.

It is considered that the funds requested for the two special studies named above are so small that the intent of Budget Guidelines 77-A is not

## COMMISSION MEMBERS

Colorado  
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Education and Welfare  
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and Urban Development  
Nebraska  
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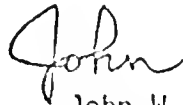
North Dakota  
Department  
of Transportation  
South Dakota  
Environmental  
Protection Agency  
Wyoming  
Federal Power Commission

Yellowstone River Compact Commission  
Big Blue River Compact Administration

Mr. Warren D. Fairchild  
February 19, 1975  
Page 2

violated. MRBC cannot include these essential studies in its operating budget for FY 1977 because of other pressing studies that are underway or are authorized for initiation in the near future. Thirty copies of each one-page study proposal are enclosed.

Sincerely,

A handwritten signature in cursive script, appearing to read "John".

John W. Neuberger  
Chairman

5 Enclosures

cc: Members and Alternates, MRBC  
MRBC Director of Planning  
MRBC Director of Administration

SPECIAL STUDY  
OF THE  
WATER REQUIREMENTS ASSOCIATED WITH INDIAN LANDS  
IN THE MISSOURI RIVER BASIN

Vast reserves of oil, gas and coal, as well as substantial amounts of potentially arable acres of farmland, are within the boundaries of the Indian reservations. With this potential large utilization of the water resources in the basin, it is essential that the present and future water requirements of the Indian reservations be identified. A review draft of "The Westwide Study Report on the Critical Water Problems Facing the Eleven Western States" concluded that Indian trust lands should have high priority in federal and regional planning for water utilization and management and recommended that studies should be conducted to determine the natural resources needs and requirements on Indian reservations.

The State of Montana, in the "Second Annual Report - Basin and State Priority Listing of Proposed Water and Related Land Resources Activities," recommended that a priority study led by the MRBC be undertaken to define Indian water rights in the Missouri River Basin. Water is a key factor in development of the vast coal resources in this Northern Great Plains region; however, the foremost and critical factor in developing the resources within this region is an identification of the Indian land and water resources utilization on the reservations. This is also true for the development of water and land resources in the entire Missouri River Basin.

Recently a program has been initiated by the Bureau of Indian Affairs to quantify water supplies and requirements for the Indian reservations in the west. These studies are being conducted primarily through the use of consultants funded by BIA working with each tribal council. Also, through the 1975 National Assessment being conducted by the Water Resources Council, the Bureau of Indian Affairs will make projections of the water requirements for the years 1975, 1985 and 2000 based on the OBERS Series E projections and for full development of Indian coal and irrigable land resources. Water and related problem issues affecting the Indian reservations will be identified and discussed in the National Assessment effort.

A commission study is needed. This study would bring together the somewhat fragmented efforts being funded by Bureau of Indian Affairs on the Indian reservations and the data and information being generated by BIA in the National Assessment.

The purpose of the study would be to assure that impacts associated with the development of water and related land resources on Indian lands would be assessed and evaluated on a consistent basis applicable to the entire Missouri River Basin as a unit.

At its regular meeting February 5-6, 1975, the Commission adopted a motion that seeks funding for a special study through the WRC in the amount of \$40,000 to develop a Plan of Study (POS) in FY 1977 which would outline a methodology and identify the issues related to conducting a natural resources study of Indian water and related land resources requirements in the Missouri River Basin.



## MEASURE OF PRACTICABLE IRRIGABLE

The Winters Doctrine did not specifically spell out the value and extent of the measure or quantity of the Indian reserved water rights. In 1963, the Supreme Court of the United States, in reaffirming the Winters Doctrine in Arizona v. California, partially clarified the quantification issue. The clarification was essentially: "the quantity of water intended to be reserved... the water was intended to satisfy the future as well as the present needs of the Indian reservations... enough water was reserved to irrigate all the practicably irrigable acreage on the reservations... the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."

The decision reached in Arizona v. California as to measure is not dispositive. The Court did not hold that the irrigable acreage formula is required as a matter of law, and it did not set forth any standards for determining how much acreage is irrigable. Although Arizona v. California indicates that "practicably irrigable acreage" is the appropriate formula for measuring the quantity of Indian water rights for Reservations on which farming and ranching were expected to take place, other Indian Reservations created for other types of occupations may (emphasis added) have water rights measured by different formulas. The general principle seems to be that stated in Winters, that the rule of interpretation of agreements with Indian Nations is that "which would support the purpose of the agreement." Thus the irrigable acreage measure may not hold for a specific Reservation.

As an interpretative matter "practicably irrigable" can be considered that acreage that can be irrigated in a feasible manner. Feasible in this context is defined as that development which would provide a reasonable rate of return on investment after payment of fixed costs, operation and maintenance costs and replacement cost as amortized over the economic life of the investment project. In effect the development would have to be feasible from a financial standpoint (ie. benefits would have to exceed costs by a profit margin) to be considered as a practicable project.

## SUMMARY OF MAJOR INDIAN WATER RIGHTS COURT CASES

Set forth below is a summary of those major court cases wherein interpretations or definitions of matters pertaining to Indian water rights have been made. Only major cases have been included for explanatory purposes.

### ISSUE

Indian reserved rights

Priority-date of reservation

Purpose of use -irrigation

Quantity of right - irrigation

Measure - practicable irrigable

Source - arising on, in, traverse,  
border

Allotted lands - pro-rata share

Purpose of use - uses other than  
irrigation

Sovereign immunity - joining the  
U.S. in state water right suits  
and adjudications

Federal reservation doctrine

Future use

Non-use

### CASE

Winters v. United States, 207 U.S. 564 (1908)

Sheen v. United States, 273 F. 93 (9th Cir. 1921)

United States v. Conrad Investment Co., 156 F. 123  
(D Mont 1927)

United States v. Ahtanum Irr. Dist., 236 F2d321  
9th Cir. 1956)

Arizona v. California, 373 U.S. 546 (1963)

Winters and Arizona v. California

United States v. Powers, 305 U.S. 527 (1939)

Winters

McCarran Water Rights Suits Act, P.L. 495, Section 208,  
July 10, 1952, 43USCA 666

United States v. District Court of Eagle County,  
401 U.S. 520 (1971)  
United States v. District Court for Water Division  
No. 5, 401 U.S. 527 (1971)

Ahtanum, Conrad

Arizona v. California, Ahtanum

ISSUE

Reservation's irrigable acreage  
Agriculture and the arts of  
irrigation

Surplus water

State jurisdiction over surplus water

Aboriginal rights, time immemorial

Indian reorganization act

Plenary power over the Indians

CASE

United States v. Hibner, 27 F. 2d 911 (1928)

Winters

Conrad, Hibner, Ahtanum

Union Oil Co. v. Walker, Cause No. 71421, in the  
Superior Court of the State of Washington in and  
for the County of Snohomish, unreported decision.

Sheem

Wheeler-Howard Act (25 U.S.C. 461, 1934)

United States v. Kagma, 118 U.S. 375

## INDIAN WATER RIGHTS VOCABULARY

The following are definitions of the basic vocabulary used in discussing water rights issues, especially as they pertain to Indian water rights. Certain of the terms are from the National Water Commission Report: Water Policies for the Future (June 1973)

Aboriginal Right - Where Indian reservations are located on lands owned by the tribes before the arrival of the non-Indian, their water rights are said to have existed from time immemorial and thus pre-date any other right.

Acre-Foot - The amount of water required to cover one acre of land one foot deep.

Adjudication - To hear, try to determine a legal issue in the courts.

Appropriation - To take water from a river or stream for beneficial use. Rivers and streams are said to be either "fully appropriated," that is, a group or groups have already established a legal right to all the water, or "unappropriated," that is, some of the water in a river or stream has not yet been legally claimed.

Arizona v. California - A case in which the U.S. Supreme Court held that in cases where tribes were not presently using the water they were entitled to in a river or stream, water will be reserved to them in an amount large enough to irrigate all the practicably irrigable acreage on the reservations, or enough water to sustain a valuable species of fish relied upon by the tribe for sustenance or other such standards.

Diversion - The removal of water from a natural river, stream or watercourse.

Fair Market Value - The price of water an owner would receive if he sold it on the public market.

Fiduciary - The legal term which describes the trust responsibility which the U.S. Government has over Indian natural resources.

Irrigable Acreage - The amount of land on an Indian reservation which could be irrigated. This would exclude acreage covered by dams, ponds, towns, mountaintops, forests and the like.

Litigation - To carry on a legal contest in the courts.

Parens Patriae - A phrase from the Latin language which literally translated means "parent of the homeland." In water rights cases it means the state will represent other private water users against Indian tribes.

Prior or Priority - The first group or individual to establish a claim to water has the first right to that water in times of water shortage. Thus an Indian reservation established in 1865 which begins its first use of water in 1865 has, in times of shortage, a right to receive water ahead of any non-Indian water right which was established after 1865.

Quantify - To determine or measure the amount of water to which Indians are entitled, in this case by determining the amount of water needed to irrigate the practicably irrigable acreage in accordance with the Supreme Court's Arizona v. California decision. A river or stream is said to be "unquantified" if it is not yet determined how much water a group has a right to.

To Record - To file notice in the State Capitol as to the amount of water to which a group has a legal right.

Reimbursable - Repayable.

Valuation - Appraisal of property or a water right.

Water Rights - A legal claim on water in a natural water-course. Non-Indian water rights are a product of state law; Indian water rights arise under federal law.

Winters Doctrine - A legal principle concerning Indian water rights derived by the U.S. Supreme Court in the case Winters v. United States in 1907. The doctrine holds that the point in time at which an Indian water right was created was at least at the time

of the establishment of an Indian reservation by the U.S. In cases where reservations are located on aboriginally owned lands, the right is said to exist from time immemorial. Thus, Indian water rights pre-date, in the Western states, most of the water rights of all other groups.

## SELECTED WATER RIGHTS REFERENCES

- Cohen, F.S., "Handbook of Federal Indian Law" (Felix S. Cohen's) edition, University of New Mexico and American Indian Law Center, University of New Mexico Press. Reprint of 1942.
- Hutchins, W. A., "Water Rights Laws in the Nineteen Western States," Vol. 1, U.S.D.A., Economic Research Service, Natural Resources Economics Division, Misc. Pub. No. 1206, 1971.
- Johnson, C. W. and Lewis, S. H., editors, 1970, Contemporary Developments in Water Law, Water Resources, Symposium No. 4, Center for Research in Water Resources, University of Texas.
- National Water Commission, A Summary Digest of the Federal Water Laws and Programs, J. L. DeWeerdts and P.M. Glick, ed. 1973; also Water Policies for The Future, 1973.
- Sax, Joseph L., "Water Law, Planning and Policy: Cases and Materials," Bobbs-Merrill Company, Inc. 1968.
- Trelease, Frank J., "Water Law-Cases and Materials," West Publishing Company, 1967.
- Trelease, Frank J. "Federal-State Relations in Water Law," National Water Commission, September 1971, National Technical Information Service, PB 203 600

# YELLOWSTONE RIVER

## COMPACT



FROM  
WATER LAWS  
OF  
MONTANA  
- 1971 -

Montana Water Resources Board  
Sam W. Mitchell Building  
Helena, Montana 59601  
July, 1971

## CHAPTER 9

### YELLOWSTONE RIVER COMPACT - RATIFICATION OF

- Section 89-901. Repealed.  
89-902. Repealed.  
89-903. Yellowstone River Compact - approval.  
89-904. Legislative and congressional approval necessary.  
89-905. Purpose of the act.  
89-906. Definitions.  
89-907. Filing written statement with Montana water resources board.  
89-908. Duty to install weir or other measuring device.  
89-909. Duty to measure water.  
89-910. Rights acquired prior to January 1, 1950 not to be impaired nor subject to the act.  
89-911. Domestic and stock uses not within the act.  
89-912. Montana water resources board to make rules and regulations.  
89-913. Act applies to adjudicated and nonadjudicated waters.  
89-914. Montana water resources board to make record available.  
89-915. County attorneys to perform certain services.  
89-916. Penalty.

89-901, 89-902. Repealed -- Chapter 91, Laws of 1953.

#### Repeal

These sections (Sec. 1, 2, Ch. 85, L. 1945), relating to the approval and ratification of the Yellowstone River Compact, were repealed by Sec. 1, Ch. 91, Laws 1953, effective February 25, 1953.

89-903. YELLOWSTONE RIVER COMPACT -- approval. The legislative assembly of the state of Montana hereby approves and ratifies the compact designated as the "Yellowstone River Compact," dated at the city of Billings, state of Montana, on the 8th of December, 1950, signed by Fred E. Buck, A. W. Bradshaw, H. W. Bunston, John Herzog, John M. Jarussi, Ashton Jones, Chris Josephson, A. Wallace Kingsbury, P. F. Leonard, Walter M. McLaughlin, Dave M. Manning, Joseph Muggli, Chester E. Onstad, Ed F. Parriott, R. R. Renne and Keith W. Trout, as state representatives of the state of Montana on a compact commission between the states of Montana, North Dakota and Wyoming; which compact is as follows:

### YELLOWSTONE RIVER COMPACT

The state of Montana, the state of North Dakota, and the state of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said states and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone national park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs



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regulation, control and use of water in the Yellowstone river basin the great importance of water for irrigation in the signatory states shall be recognized, have resolved to conclude a compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective commissioners:

For the state of Montana:

Fred E. Buck  
A. W. Bradshaw  
H. W. Bunston  
John Herzog  
John M. Jarussi  
Ashton Jones  
Chris Josephson  
A. Wallace Kingsbury

P. F. Leonard  
Walter M. McLaughlin  
Dave M. Manning  
Joseph Muggli  
Chester E. Onstad  
Ed F. Parriott  
R. R. Renne  
Keith W. Trout

For the state of North Dakota:

I. A. Acker  
Einar H. Dahl  
J. J. Walsh

For the state of Wyoming:

L. C. Bishop  
Earl T. Bower  
J. Harold Cash  
Ben F. Cochrane  
Ernest J. Goppert  
Richard L. Greene  
E. C. Gwillim  
E. J. Johnson  
Lee E. Keith

N. V. Kurtz  
Harry L. Littlefield  
R. E. McNally  
Will G. Metz  
Mark N. Partridge  
Alonzo R. Shreve  
Charles M. Smith  
Leonard F. Thornton  
M. B. Walker

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to wit:

#### ARTICLE I

A. Where the name of a state is used in this compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone river system under the authority of said state.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory state, and all others using, claiming, or in any manner asserting any right to the use of the waters of

the Yellowstone river system under the authority of said state, shall be subject to the terms of this compact. Where the singular is used in this article, it shall be construed to include the plural.

## ARTICLE II

A. The state of Montana, the state of North Dakota, and the state of Wyoming are hereinafter designated as "Montana," "North Dakota," and "Wyoming," respectively.

B. The terms "commission" and "Yellowstone river compact commission" mean the agency created as provided herein for the administration of this compact.

C. The term "Yellowstone river basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone river and its tributaries, and includes the area in Montana known as lake basin, but excludes those lands lying within Yellowstone national park.

D. The term "Yellowstone river system" means the Yellowstone river and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone river near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone national park.

E. The term "tributary" means any stream which in a natural state contributes to the flow of the Yellowstone river, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone national park.

F. The term "interstate tributaries" means the Clarks Fork, Yellowstone river; the Big Horn river (except Little Big Horn river); the Tongue river; and the Powder river, whose confluences with the Yellowstone river are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the state of Montana.

G. The terms "divert" and "diversion" mean the taking or removing of water from the Yellowstone river or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone river or of the tributary from which it is taken.

H. The term "beneficial use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "domestic use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "stock water use" shall mean the use of water for livestock and poultry.

### ARTICLE III

A. It is considered that no commission or administrative body is necessary to administer this compact or divide the waters of the Yellowstone river basin as between the states of Montana and North Dakota. The provisions of this compact, as between the states of Wyoming and Montana, shall be administered by a commission composed of one representative from the state of Wyoming and one representative from the state of Montana, to be selected by the governors of said states as such states may choose, and one representative selected by the director of the United States geological survey or whatever federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the states to sit with the commission and who shall, when present, act as chairman of the commission without vote, except as herein provided.

B. The salaries and necessary expenses of each state representative shall be paid by the respective state; all other expenses incident to the administration of this compact not borne by the United States shall be allocated to and borne one-half by the state of Wyoming and one-half by the state of Montana.

C. In addition to other powers and duties herein conferred upon the commission and the members thereof, the jurisdiction of the commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this compact, and recommendations to such states upon matters connected with the administration of this compact, and the commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by the respective states, and shall compile a report for each year ending September 30 and transmit it to the governors of the signatory states on or before December 31 of each year.

D. The secretary of the army; the secretary of the interior; the secretary of agriculture; the chairman, federal power commission; the secretary of commerce, or comparable officers of whatever federal agencies may succeed to the functions and duties of these agencies, and such other federal officers and officers of appropriate agencies of the signatory states having services or data useful or necessary to the compact commission, shall co-operate, ex officio, with the commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper administration of the compact; and these officers may perform such other services related to the compact as may be mutually agreed upon with the commission.

E. The commission shall have power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions of this compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the state engineer of each of the signatory states for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this compact, then the member selected by the director of the United States geological survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the states of Wyoming and Montana and said member selected by the director

of the United States geological survey, each being entitled to one vote.

G. The commission herein authorized shall have power to sue and be sued in its official capacity in any federal court of the signatory states, and may adopt and use an official seal which shall be judicially noticed.

#### ARTICLE IV

The commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

#### ARTICLE V

A. Appropriative rights to the beneficial uses of the water of the Yellowstone river system existing in each signatory state as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. Of the unused and unappropriated waters of the interstate tributaries of the Yellowstone river as of January 1, 1950, there is allocated to each signatory state such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each state for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

1. Clarks Fork, Yellowstone River

- a. To Wyoming                      60%
- To Montana                     40%

- b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

2. Big Horn River (Exclusive of Little Big Horn River)

- a. To Wyoming                      80%
- To Montana                     20%

- b. The point of measurement shall be below the last diversion from the Big Horn river above its junction with the Yellowstone river, and the inflow of the Little Big Horn river shall be excluded from the quantity of water subject to allocation.

3. Tongue River

- a. To Wyoming                      40%
- To Montana                     60%

- b. The point of measurement shall be below the last diversion from the Tongue river above its junction with the Yellowstone river.

4. Powder River (Including the Little Powder River)

- a. To Wyoming                      42%  
To Montana                        58%

- b. The point of measurement shall be below the last diversion from the Powder river above its junction with the Yellowstone river.

C. The quantity of water subject to the percentage allocations, in paragraph B 1, 2, 3 and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date;

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

D. All existing rights to the beneficial use of waters of the Yellowstone river in the states of Montana and North Dakota, below Intake, Montana, valid under the laws of these states as of January 1, 1950 are hereby recognized and shall be and remain unimpaired by this compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone river below Intake, Montana, on a proportionate basis of acreage irrigated. Waters of tributary streams, having their origin in either Montana or North Dakota, situated entirely in said respective states and flowing into the Yellowstone river below Intake, Montana, are allotted to the respective states in which situated.

E. There are hereby excluded from the provisions of this compact:

1. Existing and future domestic and stock water uses of water: Provided, that the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet;

2. Devices and facilities for the control and regulation of surface waters.

F. From time to time the commission shall re-examine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

Priorities of water rights;  
Acreage irrigated;  
Acreage irrigable under existing works; and  
Potentially irrigable lands.

ARTICLE VI

Nothing contained in this compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone river and its tributaries owned by or for Indians, Indian tribes, and their reservations.

ARTICLE VII

A. A lower signatory state shall have the right, by compliance with the laws of an upper signatory state, except as to legislative consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone river system not specifically apportioned to or appropriated by such upper state as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper state for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower state: Provided, that such right is subject to the rights of the upper state to control, regulate, and use the water apportioned to and appropriated by it: And provided further, that should an upper state elect, it may share in the use of any such facilities constructed by a lower state to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

B. Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.

D. The use of water allocated under Article V of this compact for projects constructed after the date of this compact by the United States of America or any

of its agencies or instrumentalities, shall be charged as a use by the state in which the use is made: Provided, that such use incident to the diversion, impounding, or conveyance of water in one state for use in another shall be charged to such latter state.

#### ARTICLE VIII

A lower signatory state shall have the right to acquire in an upper state by purchase, or through exercise of the power of eminent domain, such lands, easements, and rights of way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower state. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

#### ARTICLE IX

Should any facilities be constructed by a lower signatory state in an upper signatory state under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the laws of the upper state. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

#### ARTICLE X

No water shall be diverted from the Yellowstone river basin without the unanimous consent of all the signatory states. In the event water from another river basin shall be imported into the Yellowstone river basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the state having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with Article V herein.

#### ARTICLE XI

The provisions of this compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

#### ARTICLE XII

This compact may be terminated at any time by unanimous consent of the signatory states, and upon such termination all rights then established hereunder shall continue unimpaired.



### ARTICLE XIII

Nothing in this compact shall be construed to limit or prevent any state from instituting or maintaining any action or proceeding, legal or equitable, in any federal court or the United States Supreme Court, for the protection of any right under this compact or the enforcement of any of its provisions.

### ARTICLE XIV

The physical and other conditions characteristic of the Yellowstone river and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory states in the consummation of this compact, and none of them, nor the United States of America by its consent and approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

### ARTICLE XV

This compact shall become operative when approved by the legislature of each of the signatory states and consented to and approved by the Congress of the United States.

### ARTICLE XVI

Nothing in this compact shall be deemed:

(a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies or instrumentalities, in and to the use of the waters of the Yellowstone river basin nor its capacity to acquire rights in and to the use of said waters;

(b) To subject any property of the United States of America, its agencies, or instrumentalities to taxation by any state or subdivision thereof, nor to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any state or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any state to an extent other than the extent to which these laws would apply without regard to the compact.

### ARTICLE XVII

Should a court of competent jurisdiction hold any part of this compact to be contrary to the constitution of any signatory state or of the United States of America, all other severable provisions of this compact shall continue in full force and effect.

## ARTICLE XVIII

No sentence, phrase, or clause in this compact or in any provision thereof, shall be construed or interpreted to divest any signatory state or any of the agencies of (or) officers of such states of the jurisdiction of the water of each state as apportioned in this compact.

IN WITNESS WHEREOF the commissioners have signed this compact in quadruplicate original, one of which shall be filed in the archives of the department of state of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the governor of each signatory state.

Done at the city of Billings in the state of Montana, this 8th day of December, in the year of Our Lord, one thousand nine hundred and fifty.

### Commissioners for the state of Montana:

Fred E. Buck	/S/ Fred E. Buck
A. W. Bradshaw	/S/ A. W. Bradshaw
H. W. Bunston	/S/ H. W. Bunston
John Herzog	/S/ John Herzog
John M. Jarussi	/S/ John M. Jarussi
Ashton Jones	/S/ Ashton Jones
Chris Josephson	/S/ Chris Josephson
A. Wallace Kingsbury	/S/ A. Wallace Kingsbury
P. F. Leonard	/S/ P. F. Leonard
Walter M. McLaughlin	/S/ Walter M. McLaughlin
Dave M. Manning	/S/ Dave M. Manning
Joseph Muggli	/S/ Joseph Muggli
Chester E. Onstad	/S/ Chester E. Onstad
Ed F. Parriott	/S/ Ed F. Parriott
R. R. Renne	/S/ R. R. Renne
Keith W. Trout	/S/ Keith W. Trout

### Commissioners for the state of North Dakota:

I. A. Acker	/S/ I. A. Acker
Einar H. Dahl	/S/ Einar H. Dahl
J. J. Walsh	/S/ J. J. Walsh

### Commissioners for the state of Wyoming:

L. C. Bishop	/S/ L. C. Bishop
Earl T. Bower	/S/ Earl T. Bower
J. Harold Cash	/S/ J. Harold Cash
Ben F. Cochrane	/S/ Ben F. Cochrane
Ernest J. Goppert	/S/ Ernest J. Goppert
Richard L. Greene	/S/ Richard L. Greene
E. C. Gwillim	/S/ E. C. Gwillim
E. J. Johnson	/S/ E. J. Johnson
Lee K. Keith	/S/ Lee K. Keith
N. V. Kurtz	/S/ N. V. Kurtz
Harry L. Littlefield	/S/ Harry L. Littlefield
R. E. McNally	/S/ R. E. McNally

Will G. Metz  
Mark N. Partridge  
Alonzo R. Shreve  
Charles M. Smith  
Leonard F. Thornton  
M. B. Walker

/S/ Will G. Metz  
/S/ Mark N. Partridge  
/S/ Alonzo R. Shreve  
/S/ Charles M. Smith  
/S/ Leonard F. Thornton  
/S/ M. B. Walker

I have participated in the negotiation of this compact and intend to report favorably thereon to the Congress of the United States.

/S/ R. J. Newell  
R. J. Newell  
Representative of the  
United States of America

History: En. Sec. 1, Ch. 39, L. 1951.

#### Compiler's Note

The compiler has inserted the bracketed work "or" in Article XVIII.

#### Collateral References

Waters and Water Courses - 216.  
94 C.J.S. Waters - 315.

89-904. LEGISLATIVE AND CONGRESSIONAL APPROVAL NECESSARY. Said compact shall not be binding or obligatory upon any of the high contracting parties thereto unless and until the same shall have been approved by the legislature of each of the said states and by the Congress of the United States. The governor of Montana shall give notice of the ratification and approval of said compact by the thirty-second legislative assembly of the state of Montana to the governors of each of the remaining signatory states and to the president of the United States.

History: En. Sec. 2, Ch. 39, L. 1951.

89-905. PURPOSE OF THE ACT. Under the provisions of the Yellowstone River Compact (chapter 39, Laws of Montana, 1951 (89-903, 89-904)), all appropriative rights to the beneficial uses of the waters of the interstate tributaries of the Yellowstone river, existing in each signatory state as of January 1, 1950, have been recognized and shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation. All appropriative rights to the beneficial uses of the waters of the interstate tributaries of the Yellowstone river acquired after January 1, 1950, are subject to distribution in the states of Montana and Wyoming in accordance to the percentages in the different basins as provided in subdivisions B and C of Article V of said compact. The purpose of this act is to provide the means to determine the various appropriative rights to the beneficial uses of water of the interstate tributaries of the Yellowstone river, acquired after January 1, 1950, and the quantity of water diverted and used by each such appropriator during each year, to enable the state of Montana and the Yellowstone river compact commission to comply with and to administer the percentage allocations as provided in subdivisions B and C of Article V of said compact.

History: En. Sec. 1, Ch. 92, L. 1953.

89-906. DEFINITIONS. As used in this act, the following terms shall have the following meaning:

(a) The term "person shall mean any person, corporation, partnership, association, municipal corporation, agency and all others authorized by the laws of the state of Montana to appropriate water for beneficial uses. Where the singular is used it shall be construed to include the plural.

(b) The term "interstate tributaries" or "interstate tributary" shall mean the following described rivers which contribute to the flow of the Yellowstone river in the state of Montana, including all tributaries thereof: the Clarks Fork of the Yellowstone river; the Big Horn river (except the Little Big Horn river); the Tongue river; and the Powder river, whose confluences with the Yellowstone river are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the state of Montana.

(c) The term "domestic use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

(d) The term "stock water use" shall mean the use of water for livestock and poultry.

(e) The term "divert" and "diversion" shall mean the taking or removing of water from any interstate tributary or any tributary thereof, when the water so taken or removed is not returned directly into the channel of the interstate tributary or of the tributary thereof from which it is taken.

History: En. Sec. 2, Ch. 92, L. 1953.

89-907. FILING WRITTEN STATEMENT WITH MONTANA WATER RESOURCES BOARD. Any person claiming an appropriative right to the use of any water of any interstate tributary which right was acquired after January 1, 1950, shall within sixty days after the approval of this act, or before he diverts any water, file with the Montana water resources board at its office in Helena, Montana, a written statement containing the following information:

(a) The name of the claimant and his address.

(b) Date of appropriation or the date when the water was first applied to a beneficial use.

(c) The quantity of water claimed.

(d) The name of the stream, river or other source of water from which the diversion is made, if it has a name, and if it does not, such a description as will identify the same.

(e) The purpose for which the water is claimed and the place of intended use.

(f) The means of diversion.

(g) Whether or not a weir or other device for measuring the water intended to be diverted has been installed in his ditch or other means of diversion.

(h) If a notice of appropriation was filed with the county clerk and recorder, as provided by section 89-810, the name of the county where it was filed.

(i) Whether the appropriation was made from an adjudicated or nonadjudicated stream, river or other source of water.

The written statement shall be verified by the affidavit of the claimant or someone in his behalf, which affidavit must state that the matters and facts contained in the written statement are true.

History: En. Sec. 3, Ch. 92, L. 1953; amd. Sec. 10, Ch. 280, L. 1965.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1), sec. 89-103 herein.

89-908. DUTY TO INSTALL WEIR OR OTHER MEASURING DEVICE. Any person claiming an appropriative right to use any waters of any interstate tributary of the Yellowstone river which right was acquired subsequently to January 1, 1950, shall after the approval of this act and before he diverts any such water, install in his ditch, or other means of diversion, a weir or other measuring device so that all of the water to be diverted by him can be accurately measured. The installation of a weir or other measuring device is subject to the approval of the Montana water resources board, and if in its judgment such weir or other measuring device, or the installation of the same, is defective so that the water cannot be accurately measured, it may order the installation of an accurate measuring device and the claimant shall not divert any water until he complies with such order.

History: En. Sec. 4, Ch. 92, L. 1953; amd. Sec. 11, Ch. 280, L. 1965.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1) sec. 89-103 herein.

89-909. DUTY TO MEASURE WATER. It shall be the duty of every said claimant to measure all the water being diverted by him and to keep accurate records thereof on forms prescribed and furnished by the Montana water resources board, and within fifteen days after the first day of November of each year to file such written records with the Montana water resources board at its office in Helena, Montana.

History: En. Sec. 5, Ch. 92, L. 1953; amd. Sec. 12, Ch. 280, L. 1965.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1) sec. 89-103 herein.

89-910. RIGHTS ACQUIRED PRIOR TO JANUARY 1, 1950 NOT TO BE IMPAIRED BY NOR SUBJECT TO THE ACT. The rights to the beneficial use of any water of any interstate tributary of the Yellowstone river, acquired prior to and including January 1,

1950, shall not be impaired by nor subject to this act.

History: En. Sec. 6, Ch. 92, L. 1953.

89-911. DOMESTIC AND STOCK USES NOT WITHIN THE ACT. Any appropriation of water from any interstate tributary of the Yellowstone river made for domestic or stock water uses shall not come within the provisions of this act, provided, that the capacity of any reservoir for stock water shall not exceed twenty acre-feet.

History: En. Sec. 7, Ch. 92, L. 1953.

89-912. MONTANA WATER RESOURCES BOARD TO MAKE RULES AND REGULATIONS. The Montana water resources board shall prescribe and enforce reasonable rules and regulations consistent with this act and the Yellowstone River Compact.

History: En. Sec. 8, Ch. 92, L. 1953; amd. Sec. 13, Ch. 280, L. 1965.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1) sec. 89-103 herein.

89-913. ACT APPLIES TO ADJUDICATED AND NONADJUDICATED WATERS. The provisions of this act shall apply to both adjudicated and nonadjudicated waters of the interstate tributaries of the Yellowstone river.

History: En. Sec. 9, Ch. 92, L. 1953.

89-914. MONTANA WATER RESOURCES BOARD TO MAKE RECORD AVAILABLE. The Montana water resources board shall furnish and make available to the Yellowstone river compact commission, from the records filed in its office, all appropriative rights to the use of the waters of the interstate tributaries of the Yellowstone river in the state of Montana, acquired after January 1, 1950, the amount of the annual diversions from said interstate tributaries and any other information that its records may disclose as may be required by the Yellowstone river compact commission.

History: En. Sec. 10, Ch. 92, L. 1953; amd. Sec. 14, Ch. 280, L. 1965.

#### Compiler's Notes

The state water conservation board has been redesignated the Montana water resources board. See paragraph (1) sec. 89-103 herein.

89-915. COUNTY ATTORNEYS TO PERFORM CERTAIN SERVICES. The county attorneys of the state shall perform such legal services and bring such proceedings in carrying out the purposes of this act within their respective counties as the state engineer shall require.

89-916. PENALTY. Any person who violates or refuses or neglects to comply with any provision of this act, or any order, rule or regulation promulgated by the state engineer pursuant thereto or the Yellowstone River Compact, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200.00) for each offense.

History: En. Sec. 12, Ch. 92, L. 1953.

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